FILED

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DEC - 8 1981

ATARI, INC., et al.,

H. STUART CUNNINGHAM, CLERK INITED STATES DISTRICT COUP-

Plaintiffs,

ELECTRONICS CORP., et al.,) 81C 6434

Defendants.

Before the HONORABLE GEORGE N. LEIGHTON

Monday, November 30, 1981

9:00 a.m.

PRESENT:

MR. DANIEL VITTUM,

MR. MARTIN L. LAGOD,

MR. ROBERT KRUPKA,

USCATED

for the Plaintiff Atari, Inc. DEC 2 4 1981

MR. ERIC COHEN,

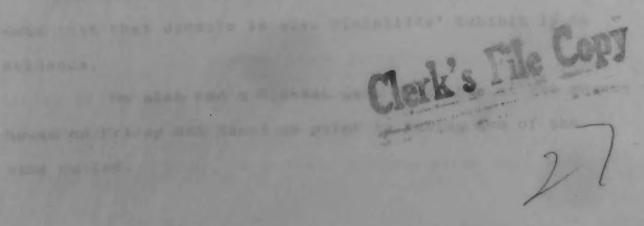
for the Plaintiff Midway Mrg. Co.;

MR. THEODORE W. ANDERSON.

MR. JAMES T. WILLIAMS,

MR. GREGORY B. BEGGS,

for the defendants.



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MR. VITTUM: Good morning, your Honor.

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MR. ANDERSON: Good morning, your Honor.

THE COURT: Good morning. You may proceed with your next witness.

MR. ANDERSON: Thank you, your Honor.

On Wednesday, as the Court knows, the plaintiff called three witnesses and we called Mr. Kunkel, the President, the Associate Editor of the magazine, Electronic Games.

We will call Mr. Ed Averett, who is the designer and creator of the game, K. C. Munchkin, as our next witness, followed by Mr. Ralph Staup who is in charge of the K. C. Munchkin and the Odyssey program at the defendant company, and finally, Mr. Ron Giese on the local practices of merchandising and advertising.

At this time I would like to mark the console or the Pac-Man arcade game as Defendants' Exhibit 14 and offer it in evidence. It was purchased by our firm on November the 20th, two days after this lawsuit was filed and retained by us until we brought it to Court here for use in this case.

MR. VITTUM: There is no objection, Judge. I would just note that that console is also Plaintiffs' Exhibit 16 in evidence.

We also had a Pac-Man game available at the courthouse on Friday but found no point in having two of the same marked. THE COURT: All right.

MR. ANDERSON: And your Honor, if I may just state again as we start this morning, as I see the fundamental issue here, it is the question of the scope of a copyright and what it can cover, whether it can cover concepts or ideas.

If I may, I would like to just hand up a copy of Durham Industries vs. Comy, reported at 630, F. 2d 905, a Second Circuit 1980 case which we cite in our proposed findings and conclusions which I think is extremely instructive and helpful on the subject.

THE COURT: All right.

MR. ANDERSON: Do we have a copy of the exhibit or you probably have it.

MR. VITTUM: Do you have a copy? .

MR. BEGGS: No, I don't have an extra copy.

MR. ANDERSON: We have highlighted certain portions starting at Page 914.

THE COURT: All right.

MR. ANDERSON: I would like to call Mr. Ed Averett, please.

EDWARD BAUGH AVERETT, III,

called as a witness by the defendants, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please, state your full

name, spell your last name. Lean forward and speak directly to that microphone. Keep your voice up.

THE WITNESS: My name is Ed, Edward Baugh Averett III,
A-v-e-r-e-t-t. I am 33 years old.

DIRECT EXAMINATION

BY MR. ANDERSON:

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- Q Where do you reside, Mr. Averett?
 - A Chattanooga, Tennessee.
- Q What is your occupation?
- A I am a programmer who designs and develops games for the consumer game industry.
- Q Describe what you do at the present time in that capacity.
- A I come up with ideas, implement them in programming language, take them to Magnavox. Magnavox, if they like them, manufactures them and pays my group a royalty, which consists of my wife and myself.
- Q Your wife and yourself?
- A Yes.
- Q What is your wife's name?
- A My wife's name is Linda.
- Q When did you and Linda start in this occupation?
- A I started in 1977, April 1st, developing software with the intent of designing games using animation for entertainment purposes.

My wife joined me approximately two years later when we were profitable.

Will you briefly outline your education since high school.

A Yes. I graduated from the University of Tennessee with a BS and an MS in Electrical Engineering, specializing in Electronics and computers.

I joined the army after college, graduated from Officer's Candidate School as a Second Lieutenant, was assigned to the Ft. Monmouth Advanced Development for Computers and Electronics Lab in Ft. Monmouth, New Jersey, worked there for two years, was discharged and went to California to begin working for Intel Corporation just after the microprocessor or microcomputer chip was introduced by them.

Q Will you briefly describe your wife's educational background?

A Yes. She is an Engineer also with a Degree in Engineering Physics. She has worked in computer software all her professional life, which is approximately 12 years. She has worked in operating systems. Her previous job was seven years with Hewlett-Packard Corporation in the scientific minicomputer area where she was responsible for all the software for that machine. The machine number is the HP 1000. That includes operating systems, languages, data bases, all facets of minicomputer software.

You might speak just a little bit slower. You may be giving the reporter a little bit of difficulty.

A I am sorry.

Q Will you just briefly describe your various titles and responsibilities at Intel?

A Yes. I was in the Marketing Department and I was responsible for marketing sales and support for the microcomputer area.

In that area, we were looking for new markets for this new product as it came out and one of the areas that I became convinced was a large potential for microcomputers was the consumer market. The best approach to entering that market appeared to me was through entertainment or graphics, graphic computer or games and so, we developed a special chip that is used in Odyssey 2 while I was at Intel and then we sold it to Magnavox. Magnavox incorporated it in Odyssey 2.

That was my entre into the Odyssey 2 program. I was imminently familiar with that system.

- Q When you refer to Magnavox, are you referring to North American Phillips Consumer Electronics Corporation?
- A Yes, I am.
- Q As it is now known?
- Yes, I am.
 - Q When did you leave Intel?
- A I left Intel April 1, 1977.

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Q Will you describe your activities after leaving Intel?

A Well, the first year after I left, I couldn't do what I wanted to do, which was to develop software on Odyssey 2 because the chip turned out to be a year late as all chips seem to.

I consequently bought an arcade system and practiced developing animation and game concepts on that for a year before the Odyssey 2 finally came on the market. After it came on the market, I met with Magnavox or met Mike Staup of Magnavox, actually, at a consumer show in January of 1978 and approached him with the idea of developing software for his products and with the -- under the understanding that I had all the hardware and that he would have nothing at risk since I knew the system pretty well and if he liked what he saw he will pay me a royalty and if he didn't he could tell me to go back home.

Q What equipment or facilities did you have for this work that you were doing at that time?

A Well, it takes what we call in the trade a development system which is a special purpose computer system specifically designed to develop software on a particular microprocessor.

Q After meeting with Mr. Mike Staup, what happened next?

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A Well, Mike liked the idea of the no risk approach to software for him and I liked the potential that I saw in the market and so he said, "Go ahead."

I subsequently went back and developed the game Take the Money and Run which I believe was the first ever chase and be chased rig game in the industry, either arcade or consumer.

Q What became of Take the Money and Run?

A Well, we took it -- I took it back to Magnavox. They liked it. They manufactured it and it has been in production since the spring or, actually, it was the late winter, I believe, the February time frame in 1978.

Q I will have marked as Defendants' Exhibit 15, an Odyssey 2 game cartridge for Take the Money and Run.

I hand you Defendants' Exhibit 15, Mr. Averett. Is that your cartridge for playing the game Take the Money and Run?

A Yes, it is.

Q Can you place it in the Odyssey 2 console and show just how it works and what display it gives, please.

MR. VITTUM: Your Honor, I think at this point I would like to raise an objection. It is the same objection that was made during the examination --

THE COURT: What is the purpose of this? This is an entirely different game. What is the relevancy

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of that game to these two that we are looking at?

MR. ANDERSON: Your Honor, it has at least two significant points of relevancy. One, it shows
Mr. Averett's skill and background and what he did in 1978 long before Pac-Man.

Second, it shows that these concepts, the ideas that are all available to everyone, were known, were being used, and that is very important on this question of the scope of the copyright.

THE COURT: All right. The objection will be overruled. Go ahead.

MR. ANDERSON: Your Honor, I don't know if you had a chance to look at the game.

THE COURT: I can see it from here.

BY MR. ANDERSON:

Q To go back to the select --

MR. VITTUM: Excuse me, your Honor. May we step up and watch the game?

THE COURT: Surely.

BY MR. ANDERSON:

- Q Now you have placed the cartridge in the Odyssey console, is that correct, Mr. Averett?
 - A Yes, that is correct.
- Q And in the Odyssey system, when you place the cartridge in the console, can you explain just what happens?

Well, you engage -- when you place the cartridge in, you engage T and it engages the program. Now the cartridge is really the keyboard looking for the consumer's input to what he is going to play and how he is going to play it.

Q Now displayed on the screen are the words, "Select game" in multiple colors. Can you explain what the colors are, what the significance of that is in the Odyssey system?

A Well, one of the significances is, in the Odyssey system we only have seven colors to work with. One of the purposes of using it in this format is to adjust your set so you are sure you have the correct color combination and the right hue on each color.

This is a green-yellow-blue-purple, cyano-white and then the black background and that is basically what we have to work with.

- And the G is red?
- A Yes, red.
- So there are seven colors and the black background. Is that true in all the Odyssey programming that you have done?
- A Yes. It is a function of the console.
- All right. Then if you will -- is that true in K. C. Munchkin as well?

 - Q There are just seven colors available?
 - Yes. Course to the same and the

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Q Would you go ahead and just briefly describe and thou the your, Take the Lond, and han that you make our with in 1978.

A As I said, this is a maze chase and be-chased game in surtain situations. The plajor controls the little juys on the side, the animated little men on the side, the blue and green large theracters. Their purpose in this yake is to run down through the grid, these fellows ander a postelyc condition which came up here (indicating).

Now this is a negative condition in this situation.

The computer controlled players will chase down the players and so the objective is to try to stay away and avoid them as long as possible.

When you are caught, the number of points that are left in there are subtracted from the total. That one is about so be caught. I amout of play right now. That followed out of the play then.

It is a chase and be-chased and then it is a function of how long you have avoided or how quickly you have captulated the computer controlled people as to how many points you get.

MR. ANDERSON: Thank you.

THE COURT: Let me ask a question. Is what is being shown on that screen called the maze?

THE WITNESS: Yes.

THE COURT: That is what is called the maze?

Averett - direct THE WITNESS: This is what I guess -- what I would always call the maze. THE COURT: And that seems to be common in all of chese video yames. All these tideo games have this Unitalteristic of the mase of something like a mase? THE WITNESS: Not necessarily. Any maze game does but you can have very good games. THE COURT: Take the ones we have here. Let us limit ourselves -- I am only interested in Pac-Man and K. C. Munchkin and games like those two. They all have the common characteristics of a maze? THE WITNESS: Yes, sir. THE COURT: All right. That is what I wanted to know. All right. Let us go ahead. MR. ANDERSON: Your Honor, I have the official rules for Take the Money and Run which I will mark as Defendants' Exhibit 16 and hand it up to the Court. THE COURT: All right. MR. ANDERSON: Which does, I think, refer to and show the maze. THE COURT: All right. Anything else from this witness at that position? MR. ANDERSON: Thank you, your Honor. Thank you, Mr. Averett. THE COURT: You may resume the stand.

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Averett - direct 1 BY MR. ANDERSON: 2 Mr. Averett, and did you first learn of the jame, 3 the arcade game, called Pac-Man? 4 A Mike Allory returned from a trip --5 Q That is Mike Staup? 6 Mike Staup, yes. 7 Q S't-4-4-p? 8 A S-t-a-u-p and as normal, when we are in a layover 9 situation in an airport, we go flown the argades and look to 10 see what new ideas, new concepts are available and how they 11 are being received by the public. 17 In our opinion -- at least in my opinion, the games 13 industry is a lot like movies or a lot like records. It has TA tronds, it has drifts of ideas where one type of game will be very popular and then it will want and another type of game will come in and it will be popular. And so we were lasting to see what the drift was. At that point in time we saw Pac-Man. When was that, approximately? That was in February of last year, 1980 -- no, 1981, I guess. February of 1981? X Yes. 2 And tell me what you and Mike Staup said or did at that time? What was your reaction?

A Well as I recall, my reaction was that somebody finally picked up on the convert of Tata the Manay and Burn I wasn't too improved with Pac-Yar, to show some of my ignorance. I diln't porceive test the incremental scoring was that significant of a concept at that time and that's what I really see is Pac-Man's real contribution here, whereas, in Tale the Money and Pan, you got points for achieving an objective. It is not a concrete objective like wating a dutwhich Pac-Man did bring and, it brought it in a non-violent way which was something new, too.

While there is no violence here, the other games that had become extremely popular in the video game business, induced shooting and blowing up, explosions, a lot of action, a lot of violence.

Q What happened next, as far as you and Mr. Staup were concerned and a game like Pac-Man?

A Well, I was working on another game at the time and as we always do, we just, you know, look around, see what is going on until I am finished with a particular project.

At that point in time, we had to make a decision on what direction he wants me to go in next. So we really did nothing except kind of talk about it. I kind of put it in the back of my head and looked at it in terms of what could be done to make it a good game.

Again, it became a very popular game on its own

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merits but I didn't perceive that. The only one I would say that I have all a like it was a quite good game.

Q Why did she like it, do you know?

- A Well, in my opinion, because it is very competitive, and yet, it is non-violent and has incremental scoring.
- Q Then what did you do next? Did there come a time when you decided to work on a new maze chase game?
- A Yes. We finished up -- I finished up, my wife and I finished up the game we were working on and we sat with Mike. The group at Magnavon laddes where we are going next on a game, and decided that we wanted to do a mase chase game, that that was becoming a very popular concept in the industry.

And it was also a good mix with our product life.

I didn't want to do Pac-Man. Mike very strongly wanted to do Pac-Man, from a marketing point of view, because if you can get the trademark of a name, you can make a lot of ground, from an advertising point of view and from popularity, from riding on the coattails, of course.

From my personal point of view, I didn't want to do it because it didn't give any room for creativity. You know, you factually get no credit for creating any new concepts or any new ideas.

And so I presented several ideas to Mike on how I could do a maze chase game that was significantly better than

..v. .. '' direct the Pas-Mon, He didn't like them at the time. I preside: sugling, "Truet on," and he said, "Well, let on sec if I can get Pac-Man." 3 About when was this? 4 This was approximately May of 1981. I was pretty 5 confident that he couldn't get it, indicentally, because I 6 felt by the time he would have got it, I would have been far enough into the game to show him the converts I had in 8 mind and dould have travinual him that they were botter and I was pretty sure that he couldn't get it away from Atari 10 because of relative market size, he hadn't stood a chance 11 on getting an name. 12 Did you ever play Pac-Man? 13 Yes. 14 When did you first play Pac-Man, as best you can 15 recall? 18 When we were making a decision on whether to go 17 with it or not we went out to the arcade and the best I 18 recall, I played it no more than twice. 19 That was two quarters? That was a two-quarter and that probably totals for me about three to five minutes of playing. I am not very good at playing. And I would say I watched for approvimately five minutes, also. Have you played the game Pac-Man, the arcade game,

since that time?

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A I really haven't even thought about it until
this legal distance on the up and in your office and in archive. I became updated on the differences of it and I played it more than I ever played it before.

Q That is since November 18th, when this lawsuit was filed?

A Yes.

Q Can you explain what you did in developing your new game and what features you provided?

A Well, there are several things that have become obvious to me as a designer that the consumer wants to see in a game.

One of them -- and I judge that from the popularity of games that have these concepts, you know -- one of them is a lot of movement on the screen. And I felt like we handed a good game that had a lot going on.

It also needs to have incremental scoring. A combination of the two is usually most successful and the following you can have small -- if you can achieve a point with a lot of action going on easily and then have that point become progressively harder to progressively h

And thus came up the concept of the moving dots.

Averett - direct

It is kind of like the carrot on the stick, if you are the analogy. The first little is very easy and you be, the simple." And then you scoop the carrot out a little all and the second bite is kind of day and by the time you get to the last little of that last moving dot, it is juite didn't cult to catch. In fact, it is moving as fast as you are so you can no longer what I call play the object. You have you to play the grid. That is not true of the first part of the dots. They are moving much slower than the player constitute character of K. C. Munchkin. It was very easy to get those.

Q Now can you explain a little more what you mean by play the object and play the grld and maybe I will interrupt you and change the cartridge and put the K. C. Munchkin cartridge in the Odyssey console and have the K. C. Munchkin cartridge marked as Defendants' Exhibit 17.

THE COURT: That is Exhibit 17?

MR. ANDERSON: Yes, your Honor, Defendants' Exhibit

17. Let 'me get the label on Exhibit 17.

BY MR. ANDERSON:

I hand you Defendants' Exhibit 17, the K. C. Munchkin cartridge Mr. Averatt. Will you demonstrate the cartridge and how it is played for the Court, please.

A What I am talking about when I say, "Play the grid," as opposed to the object, if you are moving, if the player-controlled object is moving slower or faster than an object

176 Averett - direct you are running down, all you have to do is run it down. The don't have to worty about there it is going, like I was date. That aut. I haver had to concern mysulf amout brother It is going to sip through. "To I wan't having to play the grid. I was just having to run the object down. That is because the Munchkin is moving faster than the dot is? Yes, that's correct. Now in the case of the relationship between Y. A. Manchhin and the munchers, just the opposite is true. They are moving at exactly the same speed all the time and so you have to play the grid. So if I want to avoid it, I can avoid it by running a straight line but it will catch me on the curves. What I can do is play the grid. If I can run down were and run through here and effectively fake it off through the grid, that is the objective and you can avoid or til to catch an object when you are playing the grid, in my termino-T guess what I am trying to say is when you are playing a new grid jame -- I mean, this is true of any grid jame --THE COURT: The court reporter is having Mr. Grice, is it possible to get that microphone and discement it from the pollum? The lt reach over there? THE CLERK: It reaches a certain distance, your Honor.

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Torutt - direct THE WITNESS: I can speak louder. THE COURT: Why don't you use that microphone and go ahead. Just use the microphone. Speak into the microphone. BY THE WITNESS: That, in my opinion, is a very important idea behind this game in that it is no langue -- the pacpose of the data is no longer to give incremental scoring here, but the purpose is to provide action on the street and to change the 0 play. The other real important fact here is that since 2 the dots are moving, if you have a lapse of concentration of 13 only a half, a second or less, the whole playfield charges. 14 You can't say, "What" and then look back and play the same 15 42100. 18 So, it is always constantly changing. So, if you 17 are able to keep your boncontration hened in, you can omit on the dots being protty such in the same or a but you ran't 18 count on the munchers lain; in the same area. They are a 19 30 function of your position, not a function of time. The other real important concept here is the 21 moving grid. I don't think anyboly has used a row of prid in any of the grids I am aware of, like this. At first glance you might say well, it is just something cute and ornamental but it is really not. It has

if I could == I am not sure I could do it -- and avoid the

Now in certain situations, you can get in there and avoid -- so, it is a new way of playing the grid that is a more dynamic way.

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And it also has a big effect on how soon the munchers are regenerated. I whink it is bad when anytime that are in any part of a playfield, you sake always sount as something happening in a given period of time because then it incomes, you can figure it out. If you can make it rundom there you don't know, if you bite something or catch something, how soon it is going to come hack at you, it makes the game much more challenging if you can't figure it out. That is the case here. These gaps do not come back when they are musched and just go back in here (indicating). We have to kind of scare around trying to catch this little oaf.

Now, to make the point even more specific for the compared with the cup in here. I have a special purpose grid showing how you sould use the cup to segment off the grid. In other words, you can't get in this section of the grid here without utilizing this cup to maneuver into it. It will run down here and run out (indicating). Of course this enanges this game challed, compared with the cup in here. I have get to try to get out of the cup in here.

before he catches me.

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There is a line missing here. Now I run in. I have to sloam the data up hore real quickly and try to get home. right on in there (indicating) okay.

So, you see it is a very important play point that is specifically brought out by a grid that you have to use it so the consider will realize, her, it is not promental, it is very functional. Let me see. Of course, there is a tremendous variety of grids in this.

Q Will you describe the various grids and grid combinations for us, Mr. Averett?

A Possibly the best way to do that is in the programming mode. There is a programming mode bhat will allow me to select any of the four grids here.

I can select Grid 1 which is this one. I can start at zero. This is Grid 1. I can select the 2. I can play any of these grids if I choose to do so.

THE COURT: Is the grid synonymous with the word maze?

THE WITNESS: Yes.

THE COURT: Go ahead.

BY THE WITNESS:

A Or 3, which is the one we were just looking at or a random one where everything changes. And you can state playing from there. You can also take in or randow of playing

and the programming mode which is what I am in now.

There is always a southon of grids that are invisible when you are coving an you can catch the consumer's concentration even more. To, to see where he is juing, he has to stop and put hieself in jecpardy before he can continue to play. To has forgettan where the openings are and how the grid is oriented.

Now this is particularly important in a game like this where you are trying to play the grid and not play the chief. If the objects were moving slower, then it would be very possible to just run them down. But when you are having to play the grid that invisible part makes it more difficult.

There is a cadence to this on here too. Let me turn up the sound here a little bit. I can't play that one, it is too hard for me:

There is a cadence that you get in the K. C. Munchkin here. It is similar to a drumbeat. That's not it. That's it. And that cadence is a function of your score and a function of the screen and the purpose of that is, it is really critical in video games, in my uptrious because it is the hearthpat, it is like music with a rhythm. So, it is the mythm of the game which either gets your heart going or gets you in tune with the game. If it is not the correct rhythm for the play

of the yarm, it is like a song with the wrong best.

The other, the remaining significant thing is I feel it is very important in all my games to personalize as much as possible the object that the player controls so that the player relates to an object.

Consequently, we made K. C. Munchkin just as cute as a bug's who and harman't worried too much about these guys. They are kind of malicious looking. But, there was no roal extent or attempt make to give them smiles or anything like that. K. C., he smiles and he grins. When he clears the screen he actually grins. I don't know how you clear a screen under these conditions.

the consumer would say, "I am this creature here. I am K. C. Munchkin running around." You get that rapport built up.

And those are the ideas I was trying to get across in A. C. Munchkin.

Q Can you clear up the dots to show the speedup of the dots during the play of one frame or is that asking too much?

A We will see. Now watch that last dot. Now he is moving at the same speed I am and he is a for smarter. I bound never tun him down. That A. C. gian, the good last and the cadence and the invthm of the whole game has him picked up considerably.

Averett - direct a find those wots can grant more un the screen, la that correct, Mr. Averett? A Yes, they can. Without limit? A Yes. That is pretty much the ideas I was trying to gat gorous and ! folt I did get across in K. C. Munchkin. Q Now in adjusting the whole TV set, who controls the colors that appear on the screen? A The consumer. 0 Q In playing any Odyssey game, such as K. C. Munchkin, 1 how does he adjust the colors so that he knows they are properly adjusted? 13 A Well there should be an instruction book, a "select 14 game" with the correct color control. 15 2 You are that opening logend, "select game" to adjust 16 the color? 17 A Yes. Will you just briefly demonstrate how you can 18 change the colors? I might say the control is right there 19 20 underneath. A Okay. That is changed. We have changed yellow to grain, and red to orange. You can just apput she will to hajor ones. The color is even beceer. Q And when it is properly adjusted? A Well, when it is properly adjusted, it should

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the Jartillyn. I am not a TV person. I believe that is pretty good.

Going back to the M. C. Munchkin maze, if you will, one of the games, would you press the button for that?

Now what color is the maze when the set is properly adjusted?

A The maze should be purple. The munchers, it is kind of hard to tell because they overlap right there. I believe they are red, yellow and green.

K. C. is blue and when the super munchie is eaten, they turn purple. That is purple, which matches the blue background or the purple background?

Q Thank you.

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In the K. C. Munchkin, at any given stage of play, at any given time, what is the relative speed of the munchkin. versus the three munchers?

A . The munchkins and -- or the Munchkin, K. C., and the munchers always have the same relative speed. To play each other, you always play the grid.

Q Then the munchers never run at a speed less than the munchkin runs in moving?

A No.

Now you have studied Pac-Man at some length in the last two weeks or ten days you have indicated, Mr. Averett.

Tou-Mon. and the three ghosts travel at the ours speed at all times?

the same spend during the -- when they are after fac-Han,

after you can what they sail their power pill, I believe,

then they slow down to what I would say is about half speed.

Q What difference does that make in the play of Pau-Man as compared to what you have just described with respect to K. C. Munchkin?

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A Well, it means you play their dinky, winky and whatever they are called here. You try, you can run them down. You don't have to worry about the grid. You just look at the shortest path to where they are and yo for them. They are they going to be there and you are going to be able to take them in any situation --

Q In Pac-Man, from your experience, do the dots ever move?

- A Never. I have never seen them move.
- Now with respect to the total play and scoring of the jame, what constitutes one complete scoring series or event in your game, K. C. Munchkin?
- N Well, when R. C. Is say, and the thin the transfer of the land than your

any word that you see fit.

- Q You can print in your name on the display?
- A Yes, you can.
- Ω Is it possible to show that or would that be difficult?
- A No.

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- Q And explain what you are doing, please while you are doing it.
- A I probably should score a point here. No. I have got nine points. If this is the best score --
 - O That is on the left?
 - A Yes.
 - Q That is just up until now?
- A Yes, up until now. And you are allowed to put in low name with a question mark. By the way, in the liming the quantum, the computer is acking the player to enter your mane, that you have the best overe, you ahead and put it in. Okay. I will put it in. I will put out the question marks.

 Okay. I will put it in. I will put out the question marks.

 The gass best until something to flags on the standard for the same will then the question marks will then the question marks will the description and the player to feeling the same will the player to feeling the player to recent the same.

- you know, in Pac-Man, from your experience?
 - A No, I don't believe there is.
- business as an attract mode?

A Yes.

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- Q Will you please explain to the court what an attract mode is?
- A Well, in an arcade setup, you have an abundance of machines and you are trying to catch the players' eyes as they go around with quarters in their pockets, so you are trying to put a mode up there that will entire the player to play.
 - O And does Pac-Man have an attract mode?
 - A Oh, yes.
 - Does K. C. Munchkin have any kind of attract mode?
 - A No.
 - O At what point had you --

THE COURT: Before you leave that, isn't it true that K. C. Munchkin is not an arcade game or did I miss something?

MR. ANDERSON: K. C. Munchkin is not.

BY MR. ANDERSON:

- Q Well, is K. C. Munchkin an arcade game?
- A At this point, K. C. Munchkin is not an arcade

Averett - direct just but it is bought by a consumer that is going through i store looking at various games so there is some stallarity, I think. THE COURT: As I understand it, an arcade game like Pac-Man is a form of game that is kept in what is called a game arcade. You see them in airports. You see them in private clubs. I think the Union League Club has an arcade. Am I right about that? THE WITNESS: Yes, your Honor. THE COURT: While the home video game is intended for the consumer who purchases it, although he may, if he wants to, I suppose, can assemble a number of 3 these games into a private arcade, I suppose. 4 THE WITNESS: Well, that is absolutely true but 5 in one sense, it is similar in concept, though, because 16 instead of putting a quarter down you put \$20 or \$30 17 down. 18 THE COURT: I understand. THE WITNESS: And a lot of stores display these 19 20 games in an active mode. MR. ANDERSON: Your Honor, two courts, the Interna-21 tional Trade Commission and another court have held. 22 as I understand it, that the copyright on Pac-Man only 23 covers the attract mode in the first instant of play. .24 MR. VITTUM: Your Honor, that is not true.

THE COURT: Let us not go into the case law. Let us not argue. Get the evidence in the record. Let me interrupt to tell you at 10:00 o'clock you are going to have to have a short adjournment because I have a number of small matters that are going to come in at 10:00. Bear that in mind.

Let's go ahead.

BY MR. ANDERSON:

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Q At what point had you developed the play of the game to the point that you just described for dodge beighten.

Mr. Averett? When was that done?

A Well, I had it to a point where I could show Mike Staup and the people at Magnavox that I felt my ideas were superior to Pac-Man, in approximately the end of Jane, its first of July time frame.

Dook for K. C. Munchkin which is Defendants' Exhibit 3,

Mr. Averatt. On Wednesday you was made to suffer with a

nepy. I would like to give you the original at this time.

Mr. Averett, can you explain or briefly point out

A They are shown throughout, but I believe there is fine illustration -- my pages aren't -- how we look them in mine. It shows the munchers. There should be a but or only

oh, it is Pigs li, I am sorry, your Honer. It some now the animation of the munchers and K. C.

- Q And F. C. Munchkin is the little guy on the right?
 - A Oh, yes.
 - Q And he is blue?
 - A Yes.
- And the other two are two examples of the munchers, is that correct?
 - A YES.

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- Now all right. Now what happened next, Mr. Averett, in your development of K. C. Munchkin after you reached that point?
- A Well, it was about that time that Magnavox found that they could not obtain the rights to Pac-Man in the consumer area and so I got the green light to go ahead and finish the game that I was working on which I sid and completed it in the office time frame.
- Q And any time during the course of your development work, did you ever have a Pac-Man arcade game in your possession?
 - A No.
- Q Did you ever see or have any knowledge of what was inside of the yellow box that is a Fac-Man yame?
 - 2. No.
- Q To what extent, if any, did you use Pac-Man in your

Averett direct

design of K. C. Munchkin?

Well, I saw Pac-Man in the beginning, of course, and outside of the drift of the consumer saying he wanted it of it was time for a grid maze chase game, very little or none at all.

My idea was to do something uniquely different that could be recognized as something that was different and a market entity into itself.

Q Can you just briefly describe the scoring in L. C. Nunchkin?

A Well, you get one point for eating one little white munchie. You get three points for eating the flushing multi-colored munchies and you get, 'I believe it is five points for the first muncher that you get and if you can eater, another one before the other one rejevenates itself, it is ten points. I believe it is 15 or 21 points on the other ones.

Scoring is really more of a function of the number of digits that you have in the display and the field than it is of anything else.

You want to have that carrot, you know, like getting back to my carrot, you want to have a little mibble but not too much because if you run it up too fast, you get too big of a score too last, you run out of digits and the tunound throws it away.

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- K. C. and we like that, why don't we use K. C. Makin or
 K. C. to kind of cute it up a little bit, I guess, K. C.
 Yut and it.
- Q With respect to the other symbols, the munchers and the munchies, where did they come from?

A I have really very little knowledge of that. All of the work after the software is assigned to demak, then the proplement it was not arouted by mu, or the oriting and the art people.

- Q Mr. Averett, you were sitting here on Wednesday
 when the question of wraparound cand about. Howe you awar
 used wraparound in any yangs that you designed before K. J.
 Manchkin?
 - A Oh, yes.

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- Q Can you name one or more of those?
- A Well, I think one of the first ones that we used the many Alica Tovallars Plas, which was and in the land. I believe, in production, copyright.

It was a case where the players controlled the players and which, in that case, was a space ship that end able to wrap around the sides.

Wraparound is as common as mazes or grids. It

Q Did you design a game called Invaders from Hyper

Space?

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- O Does that use a wraparound?
- A Yes, it does.
- I will have marked as Exhibit 18 a cartridge labeled Invalues from Myper Space, for that a cartridge which you designed, Mr. Averett?
 - A Yes, it is.
- Q Can you place that in the Odyssey 2 cartridge and explain very briufly how wramaround enters into that game.

MR. VITTUM: Judge, I will object again. It seems to me we are getting far afield. There is no showing there is any maze at all involved in this matter. We are again, it seems to me moving far afield from a comparison and similarities of the two games that are before the Court now.

THE COURT: What is the --

MR. ANDERSON: Your Honor, once again, the test is not similarities in a copyright infringement case of this kind.

NR. VITTUM: It certainly is, your Honor.

THE COURT: Gentlemen, please. One at a time.

Let Mr. Anderson finish.

MR. VITTUM: Excuse me.

THE COURT: Go ahead.

1308 Averett - direct MR. ANDERSON: The test is the copyrightable material and minilarity of the copyrightable material and that is somelebely different from the game because it depends on the difference between succept and exprension or implementation or audio-visual display, Concept, idea, system, cannot be protected. That is in the statute. That is in Section 102(b) of the statute. MR. VITTUM: May I be heard very briefly, your 0 Honor? 1 THE COURT: Yes. 2 MR. VITTUM: The difference between idea or concept 3 and expression of that idea is basic to cop, right law. 14 It is true in the context of motion pictures, it is 15 true in audio-visual games such as these games. It is 16 no different there and the issue in all of these 17 cases is substantial similarity of the audio visual work. 18 THE COURT: All right. Let us finish asking questions of withesses. I will hear you afterwards on 19 what is the test and the other principles of law. 20 21 Let us proceed now. MR. ANDERSON: Thank you, your Honor. 22 23 WY MR. ANDERSON: Will you proceed, Mr. Averett? In this case, the player shifts are these right

here, the little gimes that I am shouting here. Thus. are computer-controlled.

Again, I have a chase and be-chased game.

If you continue to push to the right here -- that wipes out.

If I continue to push to the right, of course the shift will reappear on this side and it will speed back across and disappear from this side and reappear on this side (indicating) and of course, going the other way the same way.

MR. ANDERSON: Thank you.

THE COURT: All right.

MR. ANDERSON: I will have the reporter mark -- BY MR. ANDERSON:

- Mr. Averett, did you also design a game called subchase?
 - No, I did not.

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- Are you familiar with Subchase?
- Reasonably, but not intimately, no.
- Is that one of the Odyssey 2 games?
- A Yes, it is.
- Does it have wraparound?
- A I believe it does, yes.

MR. VITTUM: The same objection, your Honor.

THE COURT: That objection will be overruled.

"" Tibling to will have the reporter many as the Cardania of manifolds to the Salaron 2 containing for Subchase.

BY MR. ANDERSON:

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Mr. Averett, will you please demonstrate briefly have ful these apparates and whather or not it does have wraparound?

A Well, Subchase as you can see, where the computer I believe in this work the complant is imputing homes on the ship down bers. This is a standard game that came up about three years ago. It enture this side of the field and exits this side of the field and enters this side (indicating).

games. It is nothing really special.

Q Were Subchase and Invaders from Hyper Space both games introduced in Odyssey prior to 1980?

h On, jes.

the direct examination, your Honor.

THE COURT: All right.

MR. ANDERSON: I am propared to begin the cross,

your Honor.

. THE COURT: We have a little more -- a little less than ten minutes. Go ahead.

MR. VITTUM: Thank you.

Tyelel - cross CROSS EXAMINATION BY MR. VITTUM: Mr. Averett, let us start with Take the Money and hur. I bruit you am require the game well enough no as don't have to put the cartridge back in. I would like to ask a couple of questions about what that game involved. First of all, Take the Money and Run, did not involve wraparound, is that right? 3 A No, it did not. 0 There were no dots on that field within the maze 1 that was shown there? 2 No, there were not. 13 There was no offensive, defensive turnaround between 14 the characters such as you find in K. C. Munchkin, is that 15 right? 16 The offensive, defensive turnaround was a function 17 of timing and catching something. I assume there was. 18 There is no power capsule? 19 No, there are no power capsules. A I believe you mentioned in the scoring for Take the Money and Run, the final scoring was based on some 21 sonstabilion at the end of the dans, be that termor 22 Addition or subtraction, depending on which your 23 you were in, whether jou were in a charle hard of the charge DA rode.

- in K. C. Munchkin, is there?
- is an addition. It is not a subtraction, no.
- I would like to review, if I can, the sequence of make of the events that done out from your direct testimony and I believe, if I have the timing right, your testimony was that in Pobruary of 1981 you and Mr. Staup, passing through an airport in New York, now Pae-Man in an arcade at that time, is that right?
 - A It was in Atlanta, but, yes, that is correct.
 - Q In Atlanta?
 - A Yes.

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- Q And you saw the game being played in the arcade there although you didn't play it yourself, is that correct?
 - A That is correct.
- Q And later on, during the spring of 1981, you personally did play the game?
 - A Yes, I did.
- And as a result of the meeting between you and Mr. Staup, you proceeded with your project to develop the game that is now known as R. C. Munchkin, is that right?
 - A That is correct.
- And sort of simultaneously, the folks from North
 American Phillips were undertaking to obtain a license to the
 Pac-Man from the copyright owner, Midway, is that right?

- A That is correct.
- is that right?
 - A Yes.
- And by that time it had been found out that you usually not get a linear for Pagewan because Mari had the license, is that right?
 - A That is also correct, yes.
- And it is also true that Worth American made several suggestions to you in terms of some further changes that aught to be made in the game that you had initially submitted, is that right?
 - A That is correct.
- 2 So that you male some changes in the factat approximates or hazacter of your manching character, is that right, your K. C. Munchkin character?
 - A Yes, to a certain extent, yes.
- Q And you changed the color. The color was originally yellow, wasn't it?
- Yes. I feel yellow is a more personable color than blue. I would have liked to have used yellow.
- Q But North American told you you better not use

that right?

- A That's correct.
- O You also changed the colors of your musuaux characters or the appater characters, didn't you?
- A 'don't believe we did. We changed K. C., because we didn't want any confusion.
 - Q So that is the only change, is that right?
 - A I believe it was, yes.
- And with that sole change, designed to make K. C.

 Munghlin more different in your view than pag-Man, the

 change from the yellow Pag-Man character to the blue that

 shows on the screen, you want shead and the game was preduced,
 is that your testimony?
 - A Yes, it is.
- Q Now I believe when we first saw the K. C. Munchkin same shown on the screen here today, it was a parple mane, is that correct?
 - A That's correct.
- Q And I believe it was your testimony that that was the color of the maze that should show when the game is played, is that correct?
 - A That is correct.
- I am puzzled, Mr. Averett, because, let me show you the color advertisement that appeared in News (ca). Magazine earlier this month as Plaintiffs' Exhibit 6 in evidence

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and it appears rea, much to my ages that the make that in shown is blue, is that correct?

It seems bluish purple but -- I think it is not thank way.

Q It is blue, isn't it, sir?

I think it is more blue than purple but it has purple aspects.

That same bluish color is the one that appears on the large point of porchase materials that are used by North American Phillips in marketing M. C. Munchkin, isn't that right?

MR. ANDERSON: I object. No foundation for that,

MR. VITTUM: Well your Honor, I think that is highly relevant insofar as it bears on the --

THE COURT: Now, now, Mr. Vittum, let me first hear Mr. Anderson's objection. Will you state your objections so I can hear you?

MR. ANDERSON: Your Honor, the question is about some point of sale advertising. There is no foundation that the witness has seen it or has any knowledge. I think there should be a foundation.

MR. VITTUM: Well certainly if the witness has not seen it, that is the answer to the question.

THE COURT: The objection is overruled. Just

proceed now. Go ahead.

MR. VITTUM: I am sorry.

BY MR. VITTUM:

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- O Do you recall the question?
- A I really couldn't tell you. I have seen it but I don't recall one way or the other what color it is.
- Ω Incidentally, your wife has played the Pac-Man game at various times during the project in which she helped you design the K. C. Munchkin game, isn't that right?
 - A No. Actually, she never played it.
 - Q But she did see it?
 - A No. Actually, she never saw it.
- O I. would like to direct your attention to a series of questions concerning the various characters and the way they appear in the K. C. Munchkin game and see if I can understand what your testimony is concerning these basic features.

As I understand it, the K. C. Munchkin game has a central gobbler-type character that is moving under the control of the player who moves around a maze munching dots and scoring points, is that correct?

- A That is correct.
- Q Now in K. C. Munchkin, this pobbler character has to avoid the monster characters which you call the munchers, I believe, is that correct?

A That is correct.

- O And if the gobbler character does not avoid the monsters, he is, in effect captured and he deflates in sort of a spangly form on the screen, is that correct?
 - A He is removed, yes.
- Now K. C. Munchkin, when the gobbler munches one of the special dots, you have a condition for a few seconds in which the munchers are vulnerable and you reverse, if you will, the situation so that the gobbler character, as it contacts the muncher, it can destroy the muncher, is that right?
 - A That is correct.
- And the monster, when it is destroyed, turns into a sort of a silhouette of white on the screen and that returns to the central corral at that time, is that correct?
 - A Yes, it tries to.
- And when it does make it to the central corral, then it regenerates and it ultimately comes back up in its form, is that right?
 - A That is correct.
- And after a short period of time when you have the reversal between the gobbler character and the monster character, the monster characters will flash blue and white on the screen before they will return to their normal color, is that right?
- A I believe it is purple and white but I would have to check my program to make sure.

You also get bonus points or multiple points when you are able to contact one of the monsters when it is vulnerable, is that right?

A Yes.

Ω And if you are lucky enough to be able to contact the second or possibly the third monster during a single condition of vulnerability, you get multiple points again, is that right?

A That is also correct, yes.

Q And you can also, while you are operating in this maze, as you control your gobbler character, you can pass out one side on the wraparound from the maze and in the other side,

z ...

MR. VITTUM: I just have one more question, I think, to finish this.

THE COURT: Go ahead.

BY MR . VITTUM:

The final question, Mr. Averett is, with respect to all of these features that we have described and you have testified to for the K. C. Munchkin game, it is a fact, is it not, that each and every one of these features that you have just testified about, is also present and true in the audiovisual presentation of the Pac-Man game, isn't that right?

MR. ANDERSON: I object. The question was audio or visual or --

MR. VITTUM: Audio-visual. It is one word from the statute.

THE COURT: Did you hear the question?

THE WITNESS: Yes, I heard the question. I would really like to --

MR . ANDERSON: Your Honor --

MR. VITTUM: I will take it point by point after the break, your Honor. That is all right.

THE COURT: Now before we do break, let me ask you gentlemen to give me some idea how much more time this case is going to take this morning for me to finish hearing or today? Give me some idea because I have to parcel time to different cases. Give me some idea

bow ruch more time this is going to require.

MP. ANDERSON: Your Honor, we have two more witnesses, Mr. Staup who I would think would take half an hour to perhaps 45 minutes and Mr. Giese who should not take more than 15 or 20 minutes.

THE COURT: Mr. Vittum?

MR. VITTUM: Your Honor, I just have a few more minutes of cross for this witness. I don't anticipate at this moment having an additional witness. I have a couple of additional documentary items.

THE COURT: I just want to get some idea.

MR. VITTUM: Surely.

THE COURT: Let us take a short adjournment. Get the other people ready, Mr. Grice.

(Thereupon the Court gave attention to another matter on the call after which the following further proceedings were had herein.)

THE COURT: You may proceed.

MR. VITTUM: I will segment that final question and try to make it a little more simple.

BY MR. VITTUM:

Q Mr. Averett, in the Pac-Man game as shown in Plaintiffs' Exhibit 16, the Pac-Man has a gobbler character that moves around the maze munching dots and scoring points,

A Yes, that's correct.

And then you have a white silhouette of the monsters that have been returned to the central corral, is that correct?

character, they will be destroyed, isn't that right?

A No, that is not correct. In fact, Pac-Man, as I recall, has a pair of eyes that propagate back to the center of the screen.

Q Okay. That is, the eyes of what previously had been a monster, is that right?

A Yes, it is.

Q And they go back to the central corral, is that right?

A Yes.

And they are regenerated then, is that right?

A That is correct.

- And in the Pac-Man game, you score points by having the gobbler character munch dots, is that right?
 - A Yes.
- And you get multiple points for munching the special dots that are located in the corners, is that right?
 - A I really don't know.
- And'you get bonus points for having the gobbler munch the monster characters when they are vulnerable, isn't that right?
 - A That's correct.
- And you get multiple bonus points if you are successful in contacting successive ones of these monsters during the period of time -- a single period of time when they are vulnerable, isn't that right?
 - A Yes.
- Q And in Pac-Man, it is good strategy to take the gobbler character and to go over and wait near one of the special dots until the monsters approach and then munch the special dot and contact the monster character, isn't that right?
- A Actually, I don't think so, based on what I have read in the trades now. The best strategy is to follow a set pattern in the grid.
- Q But you understand there are people who do follow that strategy I just described in playing the Pac-Man game?

Nes, I would say there are people that would stay next to a dot but in terms of the real strategy behind it, I really haven't developed one.

I am sorry. I may have just asked you but I will ask you again. In the Pac-Man you move the goblin character around through the maze and you can move it through the tunnel wraparound out one side in the other side to avoid the monsters or gobblers, isn't that right?

A Yes, that's correct.

Now what I have just described in relation to Pac-Man is what you have described in your testimony as incremental scoring, is that right?

MR; ANDERSON: I object. I don't know what he means "what you have just described," your Honor.

MR. VITTUM: Let me rephrase the question.

THE COURT: The question will be rephrased.

BY MR. VITTUM:

Q Could you describe what you meant in your testimony when you indicated that incremental scoring was an important feature of the Pac-Man game that you had observed when you first saw it?

A Okay. Prior to the several very successful games that have come on, there was basic scoring where when you achieved a given objective, you got the point or center points. In Pac-Man, it would be like if you got the things you were

Averett - cross 211 chasing, you get the monsters, the incremental scoring that I was referring to is when you can get a little point for doing a little thing like if you would get a little point for the concept of catching that dot immediately and that's a new concept that I think Pac-Man brought. And I believe that was your testimony, your testimony was that that was a real contribution by Pac-Man, isn't that right? A It was the first grid game that used incremental scoring. It wasn't the first game, of course, that had incremental scoring but it was the first one that placed it in a chase -- well, I take that back, I am sorry. Head-On, I believe had it. Head-On was a game involving cars, was it not, racing cars? A ' It was a chase game. It was a chase game. In any case, Pac-Man involves this incremental scoring concept which you described? Yes, it does. Q And that same feature is found in the K. C. Munchkin game that you designed, isn't that right? A The same concept is, yes. Well, it is not only the same concept, though, it is the same way that concept appears in the audio-visual sequence of having a goblin character moving around the maze, munching

dots, munching special dots and also capturing monsters, isn't that right?

A No, I would disagree with that. I think the movement of the dots significantly affects anything you do with them.

I would say it is correct to say that the concept of scoring a point when you finally catch is the same, but, in terms of the way they interact with each other and the way you play is entirely different.

BY MR. VITTUM:

Q Well, sir, with all due respect -THE COURT: Don't argue with the witness. Don't

argue with the witness. That is his answer. Let us

BY MR. VITTUM:

- Q When the gobbler character in K. C. Munchkin captures the dot, that event produces the scoring result that you have described, does it not?
- A Yes, that is correct.

go to something else.

- You mentioned in your direct testimony that you make it a practice of studying arcade games to find out what is going on there with a view to possibility of finding types of games that may be of use to you in designing for the home market, which is your business, is that right?
 - A Yes, that's correct.
 - Q And you are familiar then with the practice of

Averett - cross transferring an argade-type game into the home video format, are you not? Yes. Q And there are certain technical limitations to the home video game based on the memory capacity and things of that nature which make the transfer of an arcade game to the home video game medium, if you will, something that requires that some differences be put into the home video game that is transferred, isn't that right? Well, that is a function of the console. There are certain home computers that can transfer this game just as it is. Q But with respect to consoles such as the Odyssey 2 console or the Atari VCS which has been referred in the testimony last week, as to those forms of home console, that really is a different medium that will permit the arcade game that is transferred to a home video format to appear slightly different, isn't that right? I would think you would have to make certain compromises in design. I really can't speak with a lot of authority on the Atari system. Q Mr. Averett, you are aware, are you not, of the extraordinary popularity of the Pac-Man arcade game? A I am now. With respect to the K. C. Munchkin game, sir, and

Averett - cross if one puts the cartridge in a console and pushes the reset button and then the zero, you will get a single maze that can permit you to play a complete game with that single maze, isn't that right? Well, you get a single basic maze with the rotating grid segment in there so it changes continuously but it is the the perimeter is the same. All right. Now that is a maze that is shown in the advertisement, Plaintiffs' Exhibit 6, which I showed you earlier, is it not? A I couldn't tell you from this picture. Let us put the K. C. Munchkin cartridge --A Would you like me to do that? Yes, if you would, please. It is Defendants' Exhibit 17. All right. Now that is, in fact, the maze that is shown in the advertisement, Plaintiffs' Exhibit 6, is it not? 3 A I really couldn't tell you. From looking at it I would say it is not. It looks like an artist's conception 9 of a maze to me. I personally, don't see any relationship 0 n of this maze to any of the mazes that I have but then they don't let me tell the artist how to do the art. 2 And it is also this basic maze that is used in the 53 introductory pages at 3, 4, 5, 6 and 7 of the instruction 24 book for the K. C. Munchkin cartridge. You might want to look 25

at it. It is Defendants' Exhibit 3.

A I believe I gave it to the attorneys.

THE COURT: Here is the original.

MR. VITTUM: May he look at that, your Honor?

THE COURT: Surely.

BY MR. VITTUM:

- Q Again I am referring to the maze that is generated by pushing the zero button on the Odyssey 2 console.
 - A Actually, it is not. They left out some items.
 - Q But it is similar to that, is it not?
 - A It is similar.
- Q And incidentally, that maze in the instruction book looks blue, doesn't it?
- A If you asked me what it was, I would have said purple.

 The hand controls look blue to me. I would say the maze is

 purple.
 - Q The color is in the mind of the beholder, I guess.

MR. VITTUM: I have no further questions, your Honor.

THE COURT: All right. Any redirect?

MR. ANDERSON: Just a bit, your Honor.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Averett, I think you testified about the moving dots in your K. C. Munchkin game.

A Yes.

Do you know of any other game that has used moving dots in the play sequence, other than K. C. Munchkin?

A No. I think again, this is the first time this has ever been used in a grid game, any moving objects that were -- where you got points.

With respect to the Pac-Man game, you indicated that it has got a pattern of uniformly spaced dots all over the screen, is that correct?

A Yes.

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Q I think you said that you were familiar with the uniformly spaced pattern of dots in various games, including Head-On?

A Yes. I have seen Head-On when it was in the arcade. It has uniform dots where you go around and get points by running over them. It is a race game, it is a chase-type of game.

Q I would like to show you Defendants' Exhibits 6
through 13 which were referred to during the Wednesday session.

Are you familiar with the game shown?

A Yes.

MR. VITTUM: Your Honor, I would again object on the same grounds I objected to last week when those exhibits were referred with Mr. Kunkel.

BY MR. ANDERSON:

Q Is that the --

THE COURT: Just a minute.

MR. ANDERSON: I am sorry, your Honor.

THE COURT: There is an objection. This is
Defendants' Exhibit 3?

MR. ANDERSON: 6 through 13, your Honor.

THE COURT: Oh, 6 through 13.

MR., ANDERSON: They are photographs.

THE COURT: When Mr. Kunkel testified?

MR. ANDERSON: Mr. Paul, I believe, testified about them.

THE COURT: Mr. Paul?

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MR. ANDERSON: And was familiar with the game Head-On. He looked at these photographs and he wasn't certain that they were Head-On.

THE COURT: Mr. Paul was shown Defendants' Exhibits 6 through 13.

MR. VITTUM: Yes, your Honor. My objection was based on the objection I made when Mr. Kunkel was testifying and you sustained the objection to examination in relation to these other games on the ground it was irrelevant to the scope of the games that were before the Court.

THE COURT: What will necessitate a different ruling, Mr. Anderson?

MR. ANDERSON: Your Honor, on cross examination,
Mr. Vittum asked a series of questions about dots and the

witness referred to the moving dots in Munchkin and the pattern of uniform dots in the Pac-Man game and your Honor again, it is the question of the scope of the copyright involved in this case and what is the copyrightable material and whatever it is that they have registered and we believe and submit that much -- in fact, everything that they have asserted, is not copyrightable material.

The copyrightable material begins when you get beyond concepts and anything that they have that might be copyrightable material is standard, is well known.

THE COURT: All right. The objection will be overruled. Ask Mr. Averett that question.

MR. ANDERSON: Thank you, your Honor.

BY MR. ANDERSON:

- Q Do Defendants' Exhibits 6 through 13 illustrate the Head-On game that you are familiar with?
 - A Yes, it does.
 - Can you just briefly look at the photographs.

MR. ANDERSON: Your Honor, I have --

THE COURT: I have a set of those.

MR. ANDERSON: All right. Thank you.

THE COURT: I have them.

BY MR. ANDERSON:

Can you just briefly describe the manner in which the car functions with respect to the pattern of uniformly spaced dots, Mr. Averett.

A Well, as I recall, one of the objectives of the game is the player maneuvers his race car around the grid trying the eliminate the dots for which he receives points.

Q Do you recall, as he moves around and eliminates dots, does he score points on it?

A Yes.

Q Mr. Averett, in the Pac-Man game, are you familiar with the display of some fruit symbols?

A I am, yes.

MR. VITTUM: Objection, your Honor. That goes far beyond the scope of cross.

THE COURT: The objection will be sustained.

MR. ANDERSON: Thank you, your Honor. No further examination.

THE COURT: Any recross examination?

MR. ANDERSON: Well, your Honor, I would like --

MR. VITTUM: No, your Honor.

MR. ANDERSON: Your Honor, I would like to offer in evidence Exhibits 6 through 19, Defendants' Exhibits 6 through 19. 6 through 13 are the photographs of the Head-On game.

14 is the actual yellow Pac-Man game.

15 is the Take the Money and Run cartridge.

16 is the instruction manual for Take the Money and Run.

17 is the K. C. Munchkin cartridge.

18 is the cartridge for Invaders from Hyper Space and 19 is the cartridge for Subchase, all for use with the Odyssey.

THE COURT: Beginning with 6 through 13, any objections?

MR. ANDERSON: 6 through 19, your Honor.

MR. VITTUM: Objection, on the same grounds of relevancy, your Honor:

THE COURT: The objection will be overruled in view of the last series of questions. And 14 to 19, inclusive, Mr. Vittum, beginning with 14, that is the same item that is in evidence as Plaintiffs' Exhibit 16.

MR. VITTUM: No objection.

THE COURT: 16, those are the cassettes or cartridges you call them?

MR. ANDERSON: Yes, your Honor.

THE COURT: The cartridges about which Mr. Averett testified.

MR. VITTUM: No objection, your Honor. No objection to any of them.

THE COURT: All right. They are admitted in evidence,

15 to 19, inclusive.

(Said exhibits, so offered, were received in evidence as Defendants' Exhibits 15 through 19.)

THE COURT: I want to ask Mr. Averett a question.
THE WITNESS: Yes, your Honor.

of the K. C. Munchkin or the Odyssey console that wraparound that you were discussing in your testimony. I want to ask you a question about it. You put it on when you were answering the questions about the extent to which the wraparound is common in such video games.

THE WITNESS: Your Honor, there were two cartridges, one a special space game and the other one a space game with things moving around.

THE COURT: The last one that you had on.

MR. ANDERSON: T believe that would be Subchaser.

THE COURT: I want to ask you a question. This is in order to enable me to see or test my understanding of the meaning of this term "wraparound".

Mr. Averett, when I first heard that term last Wednesday, I perceived the idea that the wraparound is nothing more in this industry the manufacture of audio-visual games with what is around the edge. Was I anywhere near correct?

THE WITNESS: Yes, your Honor. You are absolutely correct. What passes out here, you simply take the object and place it back here so there is a continuity of components.

THE COURT: Why isn't it that in this one I am looking at right now that has some figures -- well, the figures are changing as we look at it?

THE WITNESS: This is consistent. This will continue.

This is the player-controlled object.

THE COURT: I see. Why doesn't this one have what can be described by an ordinary layman as a border? Why is that? And yet you still refer to it as a wraparound. What is the wraparound on this one?

of it on this game is to give you a continuity of feel,
that this is a rhythm here. When this plane drops bombs -it must be out of bombs or something. Here we go. This
is a bomb. I think what they were trying to do -- I
didn't design the game but I believe the concept of
the designer who was working on it, it was supposed to
have that rhythm in smooth motion so he could drop it
over here and once he got the feel of where the projectory--

THE COURT: Well, in this one can one visually describe the wraparound? Can you?

THE WITNESS: Well it simply goes over here. The

plane disappears off this side and then to the layman, it wraps around the back and reappears here.

THE COURT: I see.

THE WITNESS: Technically what I should do is take it from here and put it over here (indicating).

THE COURT: All right.

MR. ANDERSON: Could we put the Munchkin back on, your Honor, and explain the same thing with respect to Munchkin?

THE COURT: Yes.

THE WITNESS: Now here, exactly the same. If I can control this thing --

THE COURT: Yes.

THE WITNESS: It simply goes back and forth and to the layman, the idea is it gives the continuity of getting from one side to the other.

THE COURT: I see.

THE WITNESS: The rhythm. It wraps around the back.

Technically, all you simply do is take the coordinates

here and place them in here.

THE COURT: All right. Thank you, Mr. Averett.
(Witness excused.)

THE COURT: Your next witness.

THE COURT: Stand and be sworn.

RALPH STAUP,

first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. State your full name for the record and spell your last name.

THE WITNESS: Ralph William Staup, S-t-a-u-p.

DIRECT EXAMINATION

BY MR. ANDERSON:

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- O Mr. Staup, will you please state your age and residence.
- A Thirty-seven years old. I live in Knoxville, Tennesee.
- Q Are you normally known by a nickname other than Ralph William Staup?
 - A I am better known as Mike Staup.
 - Q What is your present employment, Mr. Staup?
 - A . I work for North American Phillips.

THE COURT: Mr. Staup, that does not amplify your voice. If you look straight in front of you --

THE WITNESS: I am sorry.

THE COURT: -- you will see a microphone that amplifies your voice. That one only records, the one on your left.

Go ahead.

BY THE WITNESS:

A I am employed by North American Phillips Consumer Electronics Company.

BY MR. ANDERSON:

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- Q What is your position?
- A My job title is Director of Business Planning for Interactive Devices, and that means I am responsible for the preparation of the business plan and the product development for a couple of lines of business including the Odyssey brand video games and the lazer vision video disc players.
 - Q For how long have you held that position?
- A This specific job title I have held for about six or eight months.
- Q And prior to that, were you employed by North American Phillips Consumer Electronics Corporation?
- A Yes. Prior to February of this year, we were known as Magnavox Consumer Electronics Company, and there was an acquisition of some GT&E assets, and we formed a new company.

 That's the reason you hear us called as NAP and Magnavox.
 - Q Prior to February of 1981, were your responsibilities substantially the same as they were after the equisition?
 - A Yes, essentially the same. The only difference now is that I need to plan products and business plans for four different brand names as opposed to one or two brand names, previously.

Staup - direct - 16 A STATE OF THE PARTY NAMED IN COLUMN TWO IS NOT When did you assume the responsibilities that you now have? Essentially, I started out with Magnavox in a strategic planning position. When was that? That was in 1974, June of 1974. After doing that for a year, I became the Project Leader for the lazer video disc system which was a new introduction of a new kind of product in this country, and I did that for about two years doing the basic preparatory work for that. Along the line, we decided to enter the video tape recorder business, and I also assumed responsibility for that, and I think just about at the same time I also assumed responsibility for the business planning and product planning for the Odyssey programmable video game. In about what year or when was that? 0 That would have been, I think, in the fall of '77. Will you briefly trace your education after high school. I have a BA and MBA from Michigan State University in Marketing and some Ph. D. work in Management Science. In what years did you obtain your BA and MEA? I receive my BA in June of 1966, and my MBA in 24 December of '67. Would you briefly trace your work experience and

Staup - direct

history after receiving your MBA up until the time you joined Magnavox in 1974.

A I graduated in December of '67./went to work for the IBM Company as a Marketing Trainer.

A I graduated in December of '67./went to work for the IBM Company as a Marketing Trainee. I spent about three months being trained, and then I was inducted into the Army and spent two years, essentially, two years in the Army and came back to, work for IBM, I think, in 1970.

I assumed the position of Marketing in the computer Data Precessing Division until I left IBM and joined Magnavox in 1974, June of '74.

Q How did you first become involved with the Odyssey program work?

A As I mentioned, I started out with responsibility for the video disc and then video tape recorders, and there had been another gentleman that had responsibility for Odyssey who left Magnavox and it seemed like a natural fit with my other products since they all hook up to a television set.

We call them ancillary products.

Q Can you just generally describe the nature of the home TV game business.

A Well, the business is different, I think, in many respects from consumer electronics in the case of the Odyssey video game and I think -- or the consumer video game business, as we know it, the idea is to try to sell your system into the market business, both consoles and cartridges, and then

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you try to establish a cartridge or -- excuse me -- a console base in the marketplace and continue to grow from that and then sell cartridges into that base. Sort of a little like the razor blade and razor business.

Q And when you refer to a console business or a cartridge base, what are you referring to as a base?

A A console base, as I would describe it, is essentially how many of your particular consoles are in place in consumers' hands. That is, how big a universe do you have to sell cartridges into, and the other aspect of the business is how many new consoles can you put in place along with cartridges in a given year.

Q Has Magnavox had a pattern of marketing cartridges over the years that you have been involved?

A Well, since I have been involved, the video game business was originally initiated, I think, in '71 or '72 by Magnavox, and it was then a very substantially different business.

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It was a dedicated business. We call it dedicated chip days where each console substantially did just one game, and there was very little, little or no programmability aspect about it.

That was, I said, initiated by Magnavox and was a little like a roller coaster in terms of sales and profits, and I think that dedicated chip business peaked in 1975 and

Staup - direct 1976, and a lot of people that were in that business got out. of it, and then the business changed towards the programmable business, and that is a different business where you essentially sell a console and then the games are not infinite, but close to infinitely variable by offering new cartridges and new games on a continuing basis. Q What has Odyssey's pattern of introducing new cartridges been over the years you have been involved? Well, we have always -- we introduced the main frame itself in the fall of -- the console in the fall of 1978. 1 I think we had six cartridges at that point in time. 2 We have tried to maintain a pattern of introducing at least six new cartridges a year to maintain some momentum 3 in the marketplace. 4 Q How does Odyssey endeavor to promote or advertise 5 those cartridges? Is there any pattern to that? 6 A Well, up until about a year ago, we hadn't spent 17 too much money advertising on a national basis, at least. 18 Starting this year, we decided to put substantially more 19 investment into the national advertising, advertising of the 20 business, and what we have tried to do is feature cartridges 21 as we go along in the spring of the year. 22 Our best cartridge, we felt at that point in time, 23 was something called UFO which is a space game, and we tried 24 to feature that one as much as possible although we did not

Staup - direct 230 spend very much advertising money at that point in time. Then in the summer months, we featured a cartridge called Quest for the Rings which is something we call a Master Strategy Series. It combines a board game along with the game cartridge itself, and we spent quite a bit of effort advertising that, and now we are into the peak advertising season which is, of course, the last three or four months of the year when probably 70 percent of our business is done. Now we are featuring K. C. Munchkin, and we feel that's the best cartridge we have, best new one we have going right now. Q What, if any, relationship have you found between the sale of a particular cartridge or game with respect to the sale of consoles or other cartridges? A I don't know that we have ever been able to identify any specific pattern of business. The business is very seasonal so there is a high seasonal aspect to it. The business is growing very rapidly so it's a high 3 degree of growth so I can't say that we have any evidence that any one cartridge would affect sales that much. Q With respect to the new cartridges, in general, that you introduced, whatever they are, what is the relationship of that to the sales of other cartridges and consoles? A Well, in order to be viable in the business, we always felt we have to have a constant stream of new cartridges

coming on. The new cartridges, when they are introduced, will always sell significantly better and perhaps taper off as time goes on so if you don't bring on new cartridges, cartridge sales will suffer somewhat.

Also, main frame sales will suffer if you don't bring on new cartridges. The world gets the feeling that you are either going out of business or at least you are not a viable product compared to the competitors.

- Q Approximately how many cartridges does Magnavox now offer for use with the Odyssey 2 console?
 - A I believe 33. I could be off by one or two.

 MR. ANDERSON: I'll have the reporter mark as

 Defendants' Exhibit 20 a book entitled "The Excitement

 of a Game, The Mind of a Computer."

BY MR. ANDERSON:

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- Q Can you identify and describe that for us, Mr. Staup.
- A yes, sir. This looks like the kind of sale brochure that we would give out adjacent to where we sell Odyssey video games, and it would be a page or I believe two pages for each one of the cartridges that we offer at any point in time to go with the console. It would be a summary, I guess, on the last page which gives you the model number and the title of each of them by category.
 - Q That would be Page 67 of Defendants' Exhibit --
 - A I think 66 by my copy.

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When did you or Odyssey begin a business relationship with Mr. Avarett?

A Well, the first meeting in January, 1978, the Consumer Electronics Show, Mr. Averett approached me and said he was interested in doing games for the Odyssey system. Now in that point in time, I have a lot of inquiries and a lot of people who approached me to do that, and I really don't take them very seriously because there's a big difference between having an idea and being able to make it into a real good playable game, but then Mr. Averett described his experience with Intel and with the particular chip set in the Odyssey 2, and also told me he had a specific Intel Development System in place in his home, at which point in time, I took him very much seriously and we made an arrangement that, essentially, said he would write a cartridge for me. On approval, I would either reject it or if I took it, I would pay him a royalty so we shook hands and essentially, have been doing business ever since.

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- Q When was the handshake? Do you recall?
- A That was at the Consumer Electronics Show we made the handshake. I think he brought his first game in about six months later, and I looked at it, and I thought it was better than nothing and so we took it from him.
- Q What was the nature of the game develop work at Odyssey at this time?

we had taken a roller conster where we made substantial profits in one year and may have lost the same amount of profits in the next year, and we, essentially, in '78 and '79 were in a mode of trying to get out of the business.

I think in '78 and '79, we, essentially, eliminated our entire in-house staff for programming and engineering. At that point in time, Mr. Averett then became one of my key principals because I personally wanted to keep the business alive. I thought it had quite a future.

What games has Ed Averett introduced through
Magnavox or through Odyssey since your first relationship and
when?

A I am not sure I can name them. Out of 33 or 34 cartridges that we have, I think Ed and I did a count the other day and he has offered about 20 or 21 of the titles starting with Take the Money and Run, and up in through, I would say, essentially every release we had this year.

Q When did you introduce Take the Money and Run which is one of the exhibits here, Exhibit 15 and Manual 16?

A I am not exactly sure of the exact date. I do know that he did not get a paycheck in 1979 because it could have been either the fourth quarter of '79. He gets paid at

Staup - direct the end of the quarter or the first quarter of 19- -- excuse me -- last quarter of '78 or the first quarter of '79. Q Just roughly, how many new cartridges has Magnavox introduced per year? Well, I would say we try to maintain a pattern of at least six. We felt six was necessary to maintain some presence in the marketplace, and we tried to spread them on an even basis throughout the year. This year, mainly due to the complexity of the games, they are getting much more difficult and much longer programs, so we have only been able to introduce five. Q And of those five, do you recall how many were done by Ed Averett and his wife? A Yes, they were all done -- the cartridges were all done by Averett. Two of the games were what I mentioned as Master Strategy games. They are a large package with an integral board, instruction book and a lot of playing pieces. It's sort of like combining a board game, Monopoly, with video action on the screen so there were other parties involved in the development of those games beside Mr. Averett, although, he did the specific game program itself. O How would you compare the games that Ed Averett has done for you with cartridges done by others as far as playability? A Well, there are two ways to answer that question. One is others that have done that for me, I have used other

Staup - direct outside sources and his are significantly better, although, he went through a learning period. As I said, I wasn't exactly thrilled with his first game, but he has gotten progressively better as we have gone on. I would say he is far and above, in my opinion, and I am somewhat biased but I think he is probably the foremost video game author in the country today. Certainly has more experience and has more titles in the marketplace than anybody else. As opposed to the other systems on the market, either the Matel system or the Atari system, it would be difficult for me to judge because I don't know the complexity 2 or the difficulty they have in programming their systems. 3 Q Can you describe how you first became involved in 4 this K. C. Munchkin program. 8 A Well, yes. As Ed has mentioned, we were coming 16 back from Europe after spending a week there, and we had a 17 layover in the Atlanta airport, and as we usually do when 18 we are together, we spent time talking about games and we 19 went down and passed around the arcade to see what was new. 10 We saw Pac-Man at that time. Q And what were your respective reactions at that time? 12 A Well, I told Ed I kind of liked it, and Ed said that he thought it was dumb and there was nothing new. Q And then what happened next, if anything, with

respect to your interest in Pac-Man or a game of your own?

A Well, we have a -- since Ed is sort of what we call a single stream, because he can't do two things at one time.

If he is working on a game, I can't really be troubling him to do a lot of other things.

He was working on a game at that point in time, and I think he finished up sometime in April. We see each other every two weeks so we probably talked every week on the phone, and we would have conversations. Usually, most of our conversation is, "Got any idea about what we do next" and we usually go through a list of whatever we thought was a good idea at the time. We may have five or six things, and just sort of bat them around, but we never make a decision until he is ready to start because it really doesn't make any sense to do it before then.

Q When happened then next with respect to the game that you saw, and Ed's comments on doing a better game?

A Well, specifically, regarding Pac-Man, sometime during one of these conversations it came up again. We discussed it, and I think the essence of the conversation, I can't recall specific words that we used, what they were, but it's probably not -- it would not be that good a game but it's probably not -- it would not be that good a game unless we had the name to go with it because some of the things that I thought were very attractive about Pac-Man, things that I thought were very attractive about Pac-Man, the compelling sounds which I think in many cases in the

arcades are more intriguing than the action itself, and you know, they are really not out of question in a home game and some of the detailed graphics and the cute things and so on and so forth, they really can't be done on our system in the home game so if we could get the registered trademark and rights to use the copyright, I thought it might be a worthwhile thing to do so sometime during the month of March.

I told Ed I was going to see if I could get the trademark, copyright for it, and I approached our in-house attorneys and asked them if they would try to accomplish that.

Q And during that period of time after March, did you keep in touch with Ed Averett and what he might be doing?

A Oh, yes. We talked on a very regular basis, specifically, regarding Pac-Man. He felt the same way I did about it. That probably it wouldn't be that good a game without the name.

MR. VITTUM: Objection, your Honor. He should testify to his own thoughts, not Mr. Averett's thoughts.

THE COURT: What difference does it make, really?

The objection is overruled.

Let's proceed.

BY THE WITNESS:

A I am sorry. You better repeat the question again for me.

BY MR. ANDERSON:

Q I asked about your discussions and conversations

Staup - direct with Ed Averett, and what he was doing while you were working in the area ascertaining a license for Pac-Man. A Well, Ed said that he really -- well, a couple things about Ed. First of all, he considers himself to be the foremost professional in his field so it's very difficult to tell Ed what to do, and I don't try to. You know, he is independently, wealthy at this point in his life and so I don't try to tell him what to do. On the other hand, he said, "If you can get the name Pac-Man, I will try to do it for you," but he said, "I have got some ideas that would make a much better game," and I asked him to describe them to me. He did, and this was on the phone. I told him that I thought it was kind of dumb, but he said what he often says to me. "Trust me," and I said, "Okay." He said he was going to proceed on it, and I don't think that we did much or conversed much about it for quite some time. Probably not until June at the -- I think when we met, personally, in person at the Consumer Electronics Show in Chicago. At that time, had you heard anything further with respect to a Pac-Man license? A No, I had consulted our attorneys about every couple weeks, and their response to me was they couldn't get a return call from Midway.

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Staup - direct Did they finally advise you with respect to whether a license was available? A It was sometime after the Consumer Electronics Show because I remember at the show talking to our in-house copyright lawyer, and he said he still had not gotten anything, but he said he would press ahead because Mr. Averett, I couldn't have him standing idle. He is my most valuable resource, and I had to do something one way or the other. I think it was about two weeks later, about the 0 middle of June that our in-house attorney got back to me with 1 the fact that it was not available, the trademark or the copy-2 right. Q Did you report that to Ed? 3 14 Yes. A And what was his reaction to that? 18 He was absolutely delighted because had we got the 16 game, he would have had to do some substantial backing up 17 and starting over again. 18 And at that point in time, what was the status of 10 Ed's work on his own game? D I don't really know at that point in time. He told me that within a month that he would be able to finish up what he was doing and give me a first look at it, and I think he promised the middle of July sometime. And what followed that?

- at the concept which was the moving dot and initial look at the main character, K. C. Munchkin, and none of the other play action or anything else was done at that point in time, but enough that I looked at it at that point in time. The moving dots made some sense to me, I could easily see how that could be transformed into something worthwhile.
 - Q What happened next in your program?
 - A I think at that point in time, probably nothing.

 I think I said that was very nice. I probably talked about it a little bit, told him we needed sound because he had no sound at that point in time, and he went back and worked for about another month.

- And then what? Did he bring something to you!
- A Yes, he brought back a completed game in about the middle of August, I believe, and we had a review on it, looked at it, a critique, if jou will with myself and other people. I usually ask them to take a look at things, and we decided it looked like an awfully good game, and we ought to go ahead with it.

We would go through a period of a couple weeks of intensive testing. That's usually giving a lot of copies to the engineers and asking them to find errors, faults or whatever.

Q And were any changes made in the game after that:

aspect of it. The business, to my way of thinking at least, had somewhat taken a turn around April, May sometime. We nad been making cartridges for three or four years now, and then we became aware in the trade of the magazines and publications fo something called audio-visual expression which is sort of a new term for us at Magnavox or at N.A.F. and so we read, in fact, I read and sent Ed some of the early decisions or whatever legal people call things on some of the copyright cases that have been held so I consulted with our inside attorneys at that point in time to make sure that we weren't doing anything that could be considered illegal and immoral, unethical or whatever.

Staup - direct

- What happened as a result of that?
- A Our attorneys came in, and we spent an entire day and night reviewing the subject, every aspect we could think of, and we went through the play of the game, as we have here, with our inside attorneys and the result was that we had no problem with the playability of it. That did not seem to be a problem to anybody that spent a lot of time playing. It was a totally different game in concept of how it played, how it felt, how you got into it and your relationship with the characters.

that we could -- we felt we would be offensive to the indway people so we backed up and spent a couple of days trying to make as much change of those characters as we possibly could. I think, as I -- as we discussed, we should give them the constraints of the system, working in an 3 by o or 64-dot matrix to make the characters as different from the Nidway characters as we possibly could without losing the concept.

- Q Is that what you did?
- A . Yes, sir, we did.
- And are those the characters that now appear on the screen with the K. C. Munchkin cartridge.

A Yes, sir.

- a Exhibit 17
- A Yes, sir. Not right now because you have to restart it.
- How did Odyssey arrive at the name of the characters that are employed in K. C. Munchkin?
- A Well, as I said, we had gone through various aspects of the game, and we looked at the playability and decided that was a very neat concept and we had made changes to the characters that we felt that we were unique to our system.

The third thing, on the advice of counsel, was that whatever we do, we should not in any way, shape or form suggest to anybody that this is Pac-Man.

We should find a totally unique concept that doesn't raime with, sound like, suggest in any way Fac-Man so we went through

our standard procedure of trying to generate a list of as many words as we can think of and send them to our lawyers for copyright clearance, and then try to pick something that made some sense to us.

In the process of that, one of the names was Munchkin which is probably suggestive of the Wizard of Oz to most people, but that at least to me Wizard of Oz to most people, but that at least to me did have a feel. We wanted to make a very unique character, something you can like, somebody you can love, somebody totally disitinctive and really in the matter of

, Staup - direct discussing it with Ken Makin, who is the president of the company, I jokingly suggested we are going to call it K. C. Munchkin and make it his namesake which was a joke, and in time, however, after thinking it over and really testing that name on a lot of people, we liked it. People I tried it on said, "I have no idea what it is, but it's cute and I will take a look at it," and I called Mr. Makin, I think, in Florida because I didn't want to go ahead with that name without really asking the president of the company if I could use it, and he said, "Fine. If it helps, go ahead." Q Did Odyssey do anything else at the time of introduction of K. C. Munchkin to make certain the K. C. hunchkin identification was put forward uniformly and singly? A Well, as I said, up until the middle of June, we were attempting to get the use of the trademark Fac-Man and having failed, there was some concern that internally within the Magnavox Company, we might have used the word and people would get confused so we did send a letter to our dealers, I believe, that said, in essence, that K. C. Bunchkin is a unique game. It's a game in its own rights and please do not confuse it with anybody else's mark or name. Q I will hand you a copy of a document that's

Staup - direct

been marked Defendants' Exhibit 21, a memorandum dated October 27, 1981.

Can you identify that, please.

- A Yes, this is the memo I was just talking about.
- And as far as you and the management of Odyssey are concerned, did this go out to the addressees indicated on Defendants' Exhibit 21?
 - A Yes, sir.
- Odyssey do anything else at that time or did unique character of K. C. Munchkin as an identification?

A Well, I will back up a little bit. Not at this time, but back in, I would say, late August when we launched this program, I had a meeting of everybody internally within N.A.P., and as well, I think Mr. Averett, and I think that's it.

Specifically, I explained to them that this was a unique game. That I didn't want anybody to confuse this with Pac-Man in their vendor's relationship or purchasing relationship with vendors, with manufacturing people, the relationship with manufacturing people, with people, the relationship with manufacturing people, with any of the advertising art work or anything else. This was a unique game, and "Let's not make that confusion."

Q with respect to Magnavox personnel, what was the result of that effort?

Staup - direct 248 I will hand you Defendants' Exhibit 22, a letter dated November 20, 1981 and ask you if you can identify that for us, Mr. Staup. A Yes, this is the letter. Q Mr. Staup, how many dealers does Odyssey have for electronic games, approximately? A Slightly over 5,000. At least there were slightly over 5,000 when this letter was mailed. Mr. Staup, in your testimony a little while back, you referred to a console base in the industry, and you referred to that as the consoles that you have in the field, I believe? A Yes, sir. Q Just from your experience and knowledge in the field, how does the Atari console base compare to the Odyssey console base? A . Well, exact figures, I am not sure I have. My estimation is that at the end of this year, the Atari base will probably be on the order of perhaps ten times as large as the Odyssey base. Q Now I think we have had testimony on this, but 21 can anyone buy a K. C. Munchkin cartridge and use it with 22 one of those Atari consoles? 23 A , No, sir. Q And conversely, if Atari sells a cartridge

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Staup - direct

for their consule, could that be used in an Odyssey consule:

A No. sir.

Mr. Staup, if North American Phillips Consumer Electronics Corporation, the defendant here, is prevented from selling its K. C. Munchkin product at this time, what effect would that have on Odyssey's profit and loss, in your opinion?

A Yes. About a week ago, in fact, or last Wednesday we prepared some figures in our accounting department, and our estimate is that in 1981, that is the months of November and December, if we were to lose the K. C. cartridge it would, the total damage to us would be on the order of million. If we were to lose it into 1982, we would add another \$3 million. Now that specifically is regarding the K. C. Munchkin cartridge itself.

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further damage to our business due to lack of momentum in that we brought out five cartridges here, and you would take away one of our better selling ones right at the peak sales time. We would estimate that would cost us an initial \$300,000 in lost business this year, and an additional \$5 million next year in lost business.

Does Odyssey advertise the K. C. Munchkin cartridge in combination with consoles and other cartridges. I mean, in the same piece, in the same advertising piece?

Staup - direct the K. C. Munchkin cartridge have on the sale of consoles, in your opinion? A Well, as I say, to take away one of the five cartridges that we introduced this year which would be 20 percent of our new introductions, plus our latest one 3 and the one that is being featured in our advertising 7 currently, I think it would have a substantial effect on 8 our sales. If not right at the moment, but certainly near 9 the end of this year and going into the following year. lio. Can you explain whether that effect is because 11 of the nature and play of K. C. Munchkin as a game or as 12 some other -- as a result of some other factor? 13 A .K. C. Munchkin is a good game, but I would say if you took any one of our -- any cartridge that we are 14 featuring right at this particular time away from us, it 115 would have the same or similar effect. Whether it be 18 Quest of the Rings or U.F.O. or Alien Invaders or any of 17 18 them. Mr. Staup, from your experience in the home 19 video game industry, what, if any, would be the effect 20 of the sales of K. C. Munchkin cartridges on Atari's 21 ability to sell a Pac-Man game if they come out with one 22 23 next year? MR. VITTUM: Objection, your Honor. I don't 34 know that this witness is qualified to testify to 23

Staup - direct

the effect on Atari's sales.

THE COURT: What about that, Mr. Anderson?

MR. ANDERSON: Mr. Staup has wide experience in the industry, your Honor.

THE COURT: Does he know anything about Atari?
That's the reason for the objection. I suppose that
the plaintiff concedes Mr. Staup's knowledge about
North American Phillips, is that the point?

MR. VITTUM: That's right. He has already testified he can't speak to Atari.

THE COURT: I will sustain the objection. You can ask Mr. Staup some more questions. Maybe you can establish that he has personal knowledge, and if he knows, but I will sustain the objection on the ground that it's put.

BY MR. ANDERSON:

- Mr. Staup, in the time that Odyssey has been selling cartridges for its programmable console, have its competitors ever come out with a similar game to one that Odyssey had in its mind?
 - A Yes, sir.
- And in your judgment, what impact, if any, did
 the introduction of the same game have on Odyssey's ability
 to sell its cartridges?

A I think the best example of that would be

Staup - direct just about a year ago the most popular concept going a mar aro was the Space Invaders type of concept which Atari, I think, said in their annual report that it was the best selling video game cartridge of all time. It sold over one million cartridges last year. We came out with a game that was very similar in concept in November of last year called Alien Invaders Plus, and I think due to the advertising and promotion that Atari had done on Space Invaders, our cartridge was, essentially, pre-sold and that was the biggest introduction of a cartridge we had ever had. That's our leading seller at this point in time. 2 Q Mr. Staup, you were here for the testimony on 3 Wednesday and heard the testimony about Minnesota Fats 4 15 advertising here in Chicago. I would like to show you a Minnesota Pats 18 advertisement from the Chicago Sun-Times for Saturday, 17 November 20, 1961 which has been marked Defendants' Exhibit 18 23 and point your attention to the references in there to 19 the various TV consoles and games. 20 Have you seen this advertisement at any 21 time before? 22 A I don't believe so, sir. With respect to the reference in the center 24 column, the bottom of the page to the video game cartridee Staup - direct

headquarters, do you see that, sir?

A Yes, sir.

There is a reference to Atari first and several games, and then Odyssey.

Do you see that?

A Yes, sir.

Now are those three game cartridges that Odyssey now sells?

A Yes, sir, they are three new introductions this year.

Q And with respect to the console shown in the left-hand side of the page labeled "Challenge someone this Christmas with an Odyssey," is that the console that we have here in the courtroom, do you know, Exhibit 2?

A Yes, sir.

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Q Mr. Staup, does Odyssey have any advertising allowance relationship with its customers? Do you know?

A Yes, sir. We -- I think it's a standard practice in the industry. We will allow a dealer a percentage of his purchases from us to be used in what we call co-op advertising.

Essentially, the way that usually works is that if he will put in a certain amount of money, we will put in a certain amount of matching funds up to a will put in a certain amount of matching funds up to a certain amount of sales. Let's say, two, three, four percent

Staup - direct

- oross of sales to be used for local advertising.

You know of your own knowledge whether there is such a relationship with Minnesota Fats as to the sale of cartridges or consoles of Odyssey?

A No, I don't know that, sir.

MR. ANDERSON: No further direct examination.

THE COURT: Cross examination.

MR. VITTUM: Thank you, your Honor.

MR. ANDERSON: Your Honor, if I may, I will offer into evidence and I am sorry that I neglected to do it, but the new exhibits that we have identified with Mr. Staup --

THE COURT: 20 to 23, inclusive.

MR. ANDERSON: Yes, your Honor.

THE COURT: Any objection?

MR. VITTUM: No objecton, your Honor.

THE COURT: They are admitted into evidence.

(Whereupon said Defendants' Exhibits 20 to 23 inclusive were admitted into evidence.) CROSS EXAMINATION

BY MR. VITTUM:

Q Again, I would like to see, Mr. Staup, if I have the correct understanding of the sequence of events that occurred at the time when you and Mr. Averett passed through the Atlanta airport and saw the Pac-Man game there

Staup - cross he had been working on, and you went over that, and then he went back and came back a month later, I believe you said. THE COURT: You said Mr. Staup. MR. VITTUM: I am sorry, Mr. Averett. Let me rephrase the question so I am not confusing him. BY MR. VITTUM: So a very short time after you had found out about the unavailability of the license, Mr. Averett came in with his preliminary concept, and you reviewed it, and you went back and came back, I believe you said, a month later in mid-August with his final design of the game, is that the correct sequence? A Yes, sir. 15 Q And it was at that point then that Mr. Averett 16 was instructed to make some changes in the appearance of characters in order that they wouldn't look like the 17 18 Pac-Man characters, is that right? 10 A Yes, sir. And Mr. Averett's testimony, he indicated that 20 one of the changes was to change the color of the Pac-Nan 21 character from yellow to the bluish version that appears 22 in the K. C. Munchkin game, is that right? 24 A Yes, sir. Q What other appearance changes was Mr. Averett

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Staup - cross instructed to make in the characters of the K. C. Munchkin mame to make them look more different from the characters of the Pac-Man game? A Well, the only instructions that were given is to make them as far away from the Midway characters as we possibly can without losing the concept at which point in time, he retired to his home, and I think he and his wife, Linda, worked on it for a couple of days. In a couple of days, they have what is now the 3 version of what we see on the screen for the K. C. Munchkin 1 game, is that correct? 2 Yes, sir. 3 You indicated also then that North American Q 4 Phillips undertook some further review in consultation and 18 instructions with your people in-house concerning the 16 importance of respecting trademarks and not involving the 17 Fac-Man name in any case, and you indicated that Defendants' 18 Exhibit 21, the October 27, 1901 memorandum was circulated as a result of that review, is that correct? 19 A No, sir. I don't think that was circulated as 20 21 a result of that review. 22 Q I am sorry. A That probably was different channels. 23 But that was also based on the same concern 24 that someone in your organization might misuse the

Staup - cross Pac-Man name in relation to the K. C. Munchkin game, isn't that right? A That memorandum, in fact, both of them were initiated from our legal department. I am not sure exactly why they did it, but I guess you are probably right. Q Defendants' Exhibit 21, it doesn't specifically refer to the Pac-Man trademark, is that right? 8 That's correct. 9 But the Pac-Man trademark is the only one you knew about that North American was concerned about in 11 relation to this project, wasn't it? 12 A Yes, as far as I was concerned. 13 Is the circulation, Mr. Staup, of a memorandum such as Defendants' Exhibit 21, a standard procedure that N ruh American Phillips undertakes each time you bring out a new cartridge? A No, sir. Defendants' Exhibit 21 was only circulated internally in the North American Phillips organization, is that correct? A Yes, sir. This one, Defendants' Exhibit 21, did not go to dealers, correct? A That's correct. Q Defendants' Exhibit 22 which was sent out after

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211 Staup - cross the lawsuit was filed is the one the went to dealers, is 9 that right? 2 A That's correct. 3 4 You indicated in describing the advertising program that has been followed that from time to time, basically, 5 6 on a seasonal basis you feature particular cartridges in 7 your advertising, is that right? 8 Yes, sir. 9 And you mentioned that there was a cartridge that 10 you featured last spring, I think, U.F.O. in Space, is that 11 right? 12 A U.F.O., yes, sir. 13 -You indicated not very much money was put in 14 that project, is that right? 15 A Yes, sir. 16 Q Is that because of the seasonal character of 17 the business for these products? 18 Yes, sir. So that the cartridge that you are featuring n.w 79 during the Christmas season is the one which you would put 30 a major advertising expenditure behind because of the 21 importance of the Christmas market, is that right? 22 A Yes, sir. Q Your policy of featuring particular cartridges į. 1 along with the Odyssey II console is designed to sh w

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Staup - cross

the consumer an attractive game that can be played in the hopes that the consumer will be encouraged to buy the Odyssey console, isn't that right?

A Yes, sir.

And once the consumer has bought the Odyssey II console, you, in effect, have the consumer as your base for sales of other cartridges, isn't that right?

A Yes, sir.

And Atari or some other cartridge manufacturer will have, in effect, lost that consumer for future sales of its cartridges once they have the Odyssey console, isn't that right?

A I think, generally speaking, that's correct.

Q It's a policy of the defendant North American to protect its video games by copyright just like Atari and Midway does, isn't that right?

A Yes, sir.

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Let's see. I believe you indicated that you do have other new cartridges this year in addition to K. C. Lunchkin.

I wonder if you might just list what they are so we know what they are.

A They are five. The two in a master strategy series called Quest for the Rings and Conquest of the world, and three in our Challenger Series called Monkeyshines,

K. C. Munchkin and U.F.O.

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So that you would still have, even if you were prevented from marketing K. C. Munchkin, you would have the Quest for the Rings and Conquest of the World, Monkeyshines and the U.F.O. cartridges, is that right?

A Yes, sir.

And then, of course, you would have all the other 33 Odyssey cartridges that are shown in the little booklet that lists all of them, isn't that right?

A Are there 33 others?

Q I believe that was what you said.

A Take away five, and then that would give me -- all the others would be 5 from 32, right?

Q I see.

A Okay. 28, right.

Q But K. C. Munchkin is not listed in that booklet, is it, sir?

A I don't believe so, no.

So it wouldn't be five subtracted, it would be four.

A Okay. You are right.

But you would have all those other cartridges to sell to your base of consumers who had the Odyssey II console, isn't that right?

A Yes, sir.

c 1 h Staup - cross The name, yes. A Well, I think, essentially, what we did and I think actually I was out of town when this happened, but my assistant got a bunch of people in the room and asked for a brainstorming session and ended up with a sheet of paper with eight or ten names on it just off the top of the head, and I think they narrowed that down to a half a dozen that were reasonable. 9 Q Were you aware at that time that the word 0 "munchkin" or the munching concept had been associated with 1 the Pac-Man game by the plaintiff Midway, and I show you in this connection, Plaintiffs' Exhibit 4 in evidence, 2 which in the text indicates that the action of the Pac-Man 3 goes about the maze, and I will quote "scoring points by 14 munching up the dots in his path." 15 Were you aware of that? 16 17 A No, sir. Q I would like to go to your testimony on direct, 18 sir, concerning the impact of an injunction and the 10 20 \$5 million figure. First of all, \$5 million was a figure, I 21 believe I am correct, that you associated with the months 22 of November and December, 1901, is that correct? 23 A Yes, sir. 24 Q And your testimony was that if the injunction

Staup - cross were to extend in and to control 1982, there would only be an additional \$3 million of impact, isn't that right? A Yes, sir. Am I correct, therefore, in concluding that the Christmas marketing season is overwhelmingly important to the marketing of these kinds of games from a dollars and cents standpoint? 3 A Yes, that is. I am not sure what you mean to 9 imply here. It has to do with these figures. 0 I would like your testimony on a yes or no. 1 Yes, sir. 2 Q Now you referred to a 1.2 million dollars in 13 advertising, and I guess you also included something called 14 "pre-production" in that figure, but a million point two in advertising placements. Does that include television advertising, 88 17 A No, sir. 18 @ All print? 19 A Yes, sir. Do you include advertising allowances given to 21 local retailers in that figure or is that only --22 A Yes, there is a certain amount of co-op advertising 23 included there. I think the number is \$300,000. 24 Q So that it would be correct to say then the

A That we actually place, yes, but we pay for the entire million two.

Q I understand that.

A Okay.

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Q I understand that.

Go to the figure of 1.8 million in what you have referred to as scrapped goods. Can you describe what the scrapped goods are?

exactly what an injunction would cover here, but if it were to cover retrieving everything that we could from the field that had already been shipped to our dealers, plus finished that h

opportunity for you to either cancel or to shift to orders for materials for other cartridges, for example, isn't that right?

Anything that's within six weeks, I would doubt that we would be able to salvage. Essentially, that close in, if they are on order, we bought them.

Q But there is certainly the possibility of inquiring of your vendors to see if there couldn't be a shift, isn't that right?

A Yes, sir.

MR. VITTUM: May I have just one moment, your Honor.

THE COURT: Surely.

BY MR. VITTUM:

vendors.

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Q I show the witness a copy of the page 7 from part IX of Thursday, November 26, 1981 edition of the Los Angeles Times which appears to have a K. C. Munchkin game cartridge advertisement.

MR. VITTUM: I will let counsel take a look

at it.

THE COURT: What is the exhibit number of that

one?

MR. VITTUM: Plaintiffs' Exhibit 20 for identification, your Honor.

THE COURT: All right.

MR. VITTUM: I have two other ones that I previously numbered. I am going to come back to those. BY MR. VITTUM:

Now, Mr. Staup, I will show you Plaintiffs! Exhibit 20 for identification and ask you if that is an advertisement with which you are familiar or if you are familiar with the text or portions of that that may have been supplied by defendant to a retailer that placed the ad?

A I am not familiar with the ad. I am not really familiar if that's the text that we supplied them.

Q But the graphics that appear in that ad appear to be similar to the graphics that were used in the North American ad that's Plaintiffs' Exhibit 6, is that correct:

A Yes, sir, I would say these are probably either from that or the instruction book.

Q Now to perhaps put your mind at ease, I don't find the Pac-Man trademark used anywhere in this ad, but what I did find is the phrase, and I quote: "It's the popular arcade game you can now play on your own TV."

Mr. Staup, what is the popular arcade game that's referred to in that advertisement for the

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Staup - cross

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THE COURT: Any objection to Exhibit 20 for the plaintiffs being admitted into evidence, Mr. Anderson That's the New York Times, November 26, 19 --

MR. VITTUM: Los Angeles Times.

THE COURT: I am sorry. The Los Angeles Times. I couldn't even read my own notes. It's a Les Angeles Times' ad.

MR. ANDERSON: I have never seen it before just now, but I presume it's what he says it is. I don't object.

THE COURT: All right. It is admitted into evidence.

> (Whereupon said Plaintiffs' Exhibit 20 was admitted into evidence.)

MR. VITTUM: Would the Court like to see our photocopies? They are not very good.

THE COURT: That's all right. I think I know what it says.

All right. Redirect.

REDIRECT EXAMINATION

BY MR. ANDERSON:

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- Mr. Staup, can you put Defendants' Exhibit 20 in front of you, the catalog of games.
 - A Yes, sir.
 - Q And can you turn in Defendants' Exhibit 20 to

Staup - redirect - recross Now you testified with respect, on direct, to an estimate of \$5 million in damages if odyssey were prevented from continuing to sell K. C. Munchkin, is that correct? Yes, sir. Q And are those -- also, in my notes, it's indicated you indicated that that 5 million figure was not all the result of lost sales that would result in 1961, but some other additional factors, is that correct? A I am sorry. My notes indicate that your figure of \$5 million 12 lost or damages in 1961 would not be just solely the result of a lost profit in sales in 1981, but included other 14 factors? 15 A .. Yes. The majority of it would be other factors. Q Including scrappage, advertising and things of 16 17 that kind? Yes, sir. MR. ANDERSON: No further redirect. 19 MR. VITTUM: Just one question. RECROSS EXAMINATION 21 BY MR. VITTUM: Q On scrappage, Mr. Staup, it is true, is it not 23 tnet if K. C. Munchkin cartridges were simply impounded 24 or put in a warehouse rather than scrapped, it would 25

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Staup - recross

- redirect

ultimately be able to sell them if the injunction were lifted at some point in the future, isn't that right?

A It would probably depend on what point in the future. The games business has a lifetime.

MR. VITTUM: Thank you.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. ANDERSON:

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May I have you, Mr. Staup, explain what is the lifetime of a game, and how would that figure in your testimony.

A Well, several aspects of it. One is that the current mainframes that we have now are about five or six years old, and I expect that new mainframes will come along sometime in the future and replace these and make them obsolete so these consoles will no longer be the things that are primarily sold in the marketplace.

Are you speaking in terms of a year or two or can you be --

A My estimate is that Atari will introduce a new console in 1983. It's an estimate on my part.

MR. ANDERSON: No further redirect, your Honor.

THE COURT: Any further questions of Mr. Staup?

MR. VITTUM: No, sir.

THE COURT: Thank you. Your next witness.

Giese - direct

(Witness excused.)

MR. ANDERSON: We would like to call Mr. Ronald Giese to the stand.

RONALD E. GIESE,

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please. State your full name for the record and spell your last name. Lean forward and speak directly into that microphone, and keep your voice up.

THE WITNESS: Ronald E. Giese, G-i-e-s-e.

DIRECT EXAMINATION

BY MR. ANDERSON:

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- Q Mr. Giese, will you state your age and home address, please.
 - A 38 years old, resident of Mt. Prospect, Illinois.
 - Q By whom are you employed?
 - A North American Phillips Corporation.
- Q And what is your position with North American
 Phillips?
- A I am division general manager of the Magnavox Company for the midwest division.
- And are you employed by the North American
 Phillips Consumer Electronics Corporation?
- A Yes, I am.

Giese - direct

What is the Great Plains Division?

A The Great Plains Division encompasses nine states throughout the midwest encompassing Wisconsin, Illinois, North Dakota, South Dakota, Minnesota, Nebraska, parts of Washington, parts of Kentucky and Indiana.

MR. VITTUM: Excuse me, your Honor. I have got a chair that's squeaking, and it's distracting me.

I hope it's not distracting anybody else.

THE COURT: All right.

BY MR. ANDERSON:

Q Mr. Giese, will you describe your duties and responsibilities as division general manager.

A "It involves the complete marketing of Magnavox products throughout the Great Plains Division, and also the responsibility of franchising new accounts, and I have one sales manager and 24 regional managers indirectly reporting to me.

Q Do you have -- you say one senior manager?

A There is one sales manager and two senior regional managers, and 21 regional managers. Excuse me.

The two senior regional managers are what we refer to as our sales department. They are the key men we have in our organization. One is located here in the City of Chicago by the name of Tom Slipbrac, and the other gentleman is Don Mullins located in the State of

Missouri.

Do you meet regularly with the sales manager and regional managers that report to you?

We get together at this time of the year. There's a general meeting every Monday morning to review what is going on in the marketplace. We review our competitive situation where we are at, what advertising events are taking place in the market.

Q Have you been meeting regularly in the last month or two on that basis?

We started meeting, approximately, the first week in -- excuse me -- the first week in October, end of September, somewhere in that period of time. There is a total of seven regional managers in the City of Chicago.

By sales manager, myself and our merchandising service at the administrator are/ meetings on Monday morning.

They last about an hour and a half to two hours.

memorandum in late October regarding the name of and the use of the name K.C. Munchkin on Odyssey's video game!

A There was a letter that was received, and I can't recall the date of it offhand, but there was a letter that was received that indicated that the game K. C. Munchkin should not be referred to as anything other than

Giese - direct

K. C. Munchkin. There was no reference in that letter, as I recall, to any other cartridge name or --

I will hand you Defendants' Exhibit 24, Mr. Giese.

Can you identify that, please.

A Yes, it's a letter that was sent to me as division general manager on October 27 from our legal counsel, Mr. Tom Hafner.

MR. VITTUM: Excuse me. This is the same as

Defendants' Exhibit 21 except it has his receipt stamp.

Is that the only difference?

MR. ANDERSON: I believe so. Yes, Mr. Vittum.

THE COURT: All right.

BY MR. ANDERSON:

- Q Mr. Giese, this bears your received stamp on it?
 - A Yes, it does.
 - Q What does that indicate?

office. My secretary has been instructed to date stamp everything that comes into the office. There are deadlines on advertising claims, etc., which must be matched up to make sure we are within the given time of the program.

Q Was this memorandum, Defendants' Exhibit 24, used by you or referred to by you at any meeting with your people?

A I believe that was referred to at a meeting.

Giese - direct Thother it was the morning It was received, which was the second it was date stamped, or whether it was subsequently during that week, I don't recall. And exactly what was done with regard to the subject matter of Defendants' Exhibit 24 by you, Mr. Giese: 5 6 A I reviewed the content of the letter stating 7 the fact that K. C. Munchkin is not to be referred to 8 as anything other than K. C. Munchkin, and to make sure that the regional managers involved had referred and had 10 covered this matter with their dealer organization. That 11 the only name that we would want it advertised as or 12 promoted as would be K. C. Munchkin. 13 Q . At about this time, had you had any other communica-14 tions with anyone in the Odyssey organization with respect 15 to K. C. Munchkin and its identification? 16 A Prior to this letter, there is what we refer to 17 as an infamous grapevine that co es out of the corporation, 18 and it indicated there would be some probable problems related to the dealer organization referring to K. C. Nunchkin 19 as something other than what it really is. 20 Q Do you know, to the best of your knowledge, did 21 your sales personnel in your organization carry the word 22 to your dealers with respect to identifying K. C. Munchain 23 24 as K. C. Munchkin? 25 They were instructed to do so, and I have due

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through.

There was an instance, and I don't know whether the instance with that Minnesota Fats ad was prior to this letter or after this letter, where I gave specific instructions to Mr. Slipbrac to review that with Mr. Minnesota Fats. I believe the ad referred to it as a Pac-Man-type game.

I will show you a document that has been marked as Defendants' Exhibit 4 and ask you if that is the Minneseta Fats ad that you were just referring to?

A . I believe there was one ad that was prior to this, but the ad was very similar.

Q This ad is dated November 13, 1981, is that correct?

A That's correct.

Q I will show you an ad which has been marked as
Derendants' Exhibit 5 of Minnesota Fats from the Chicago
Tribune for Sunday, November 22, 1981.

THE COURT: Mr. Giese, will you keep that document away from the microphone because it interferes with the recording.

THE WITNESS: Okay.

THE COURT: The one that the court reporter uses

Glese - direct in the courtroom. Fine. 2 Go ahead. BY MR. ANDERSON: 3 Can you identify that ad as one you have seen before? 6 A Yes, I have. Now is this the other ad that you had in mind when 8 you mentioned the other ad? 9 No, I believe there was one more and the wording 10 had been changed in the third ad. It went from "a Pac-Man-11 type game" to "as challenging as Pac-Man." 12 Now what happened in your organization after you 13 became aware of these advertisements or any of the earliest 14 of these Minnesota Fats advertisements? 15 A Mr. Slipbrac was instructed to review it with 18 Minnesota Fats and go over the fact that this can be 17 referred to as only K. C. Munchkin. I did not know what had happened at that particular time until earlier this week 18 I had asked Tom Slipbrac as to what really Minnesota Fats' 19 comment was coming back, and it was very noncommittal. 20 MR. VITTUM: Objection, your Honor. He is testifying as to what somebody else told a man who 22 told him. It's hearsay. 23 THE COURT: It all depends, Mr. Vittum, what it's offered for.

Giese - direct

Would you read the question and answer i'r me, Ms. Arboit, please. Just read the question and answer.

(Record read.)

THE COURT: The objection will be overruled. Proceed.

'MR. ANDERSON: Thank you, your Honor.
BY MR. ANDERSON:

Mr. Giese, I would like to show you a third
Minnesota Fats ad which I have just had marked as Defendants'
Exhibit 24.

MR. VITTUM: Excuse me. I think 24 is the memorandum, sir.

MR. ANDERSON: You are right. 25. Thank you.
THE COURT: All right.

MR. ANDERSON: Mr. Vittum, I den't think -- we have not provided you with copies of that ad. I am not sure you have seen it.

BY MR. ANDERSON:

- Q Mr. Giese, I show you Defendants' Exhibit 25 and ask if that's the third ad that you referred to of Minnes to Fats that makes some reference to "as challenging"?
- A Yes, that is the third ad I was referring to.
- Q So that the ads now that you have before you,
 Defendants' Exhibits 4, 25 and 5 are the three ads that

Giese - direct 282 you were referring to in your testimony? A That's correct. After instructing Mr. Slipbrac to go back to Minnesota Fats, did you receive any further communications from the Odyssey organization in Knoxville? The letter announcing the fact that there had been a lawsuit filed naming North American Phillips Corporation and Park Magnavox as co-defendants. Q I will hand you Defendants' Exhibits -- a document that's been marked Exhibit 26 dated November 20, 11 12 Can you identify that letter? 13 A "Yes. 14 Yes, would you now state what you have in your 15 hand as Defendants' Exhibit 26. 16 A It is a letter or mailing from N.A.P. Consumer Electronics Corporation in Knoxville, Tennessee, to all 17 Odyssey dealers announcing the lawsuit with Atari, Midway, 18 naming North American Phillips and Park Magnavox. 19 Q Did you receive the letter, Defendants' Exhibit 20 21 20% Yes, that was received at my office on Monday, 22 the 23rd, if you will notice the date stampel, and I recall 23 that one very, very openly because we had the complete 24 sales force in again for that meeting and I excused myself

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Giese - direct

for a lung-distance phone call and went in the mail. This was in the mail that morning.

And at that meeting, what, if anything, did you do with respect to this letter and the subject matter of this letter?

This was reviewed with the entire Chicago sales organization. My sales manager was in attendance at that meeting, and we discussed the letter as it's written here. That there was legal action pertaining to the use of Pac-Man rather than K. C. Munchkin.

Did Mr. Slipbrac make or did you ask Mr. Slipbrac to make any further efforts with Minnesota Fats in order to seek their cooperation?

A No, at that particular time I was not asked to get us any additional support. Mr. Slipbrac did have the letter, and he was to carry that message to his organization the same as we had at the first meeting.

Q I will hand you an exhibit which has been marked during Mr. Staup's testimony as Defendants' Exhibit 23, a page from the Chicago Sun-Times for Saturday, Nevember 22, 1981.

Have you seen that advertisement of Minnesota

Fats before?

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A Yes, I have. It's a copy of the ad dated November 28, Saturday, referring to the Odyssey game

Giese - direct with no reference to any cartridge at all in the ad. Q Do you know what relationship, If any, the series of ads has with your sales personnel to conform to the instructions of the two letters, Defendants' Exhibits 24 and 5 A No, I really don't. I would hope it was a direct 6 result of my conversation with them, but I cannot testify 8 to that. 9 Q With respect to the Minnesota Fats ad, Defendants' 10 Exhibit 23, in the center part of the page, can you state 11 what, if any, Odyssey cartridges are referred to: 12 A The ad refers to Quest for the Rings, Monkeyshines 13 and K. C. Munchkin which are our new Odyssey cartridges. 14 Q Can you describe what, if any, relationship 15 North American Phillips Consumer Electronics has with 16 Minnesota Fats, business relationship? 17 A Minnesota Fats is a franchise dealer of ours 18 in the North American Phillips organization. They are a 19 totally independent business, and we sell them Magnavox 20 products through the organization. a Are you able to control their advertising? 21 A No, the advertising is as an independent business-22 man and we are not able to control it, per se. We are In a position to authorize the advertising in advance for an account that does have advertising funds coming or

Giese - direct does carn advertising funds. 1 Q Do you have -- dues Magnavox or odyssey mayo 2 any ongoing co-op advertising relationship with Minnes to 3 Fats with respect to video game cartridges? 4 5 A There are particular buy-in programs, periodically. 6 One of the buy-in programs took place last June whereby a 7 given account agreed to take delivery of a certain amount 8 or quantity of products and for that purchase, they earned 9 additional advertising funds or earned advertising funds. 10 Minnesota Fats did not live up to that 11 commitment of accepting delivery of the graduat, and there-12 fore, he had no advertising dollars on that particular 13 purchase. 14 With respect to the Minnes ta Pats ad. Lefan March 15 Exhibits 4 and 5 and the one I must recently homes and. 18 23? 17 W N 1, 25. 18 Can you state whether Magnavox or Odyssey 19 has provided any financial support for any of shuse on A Those ads are laid out at this particular time. 21 2 The dealer would have t have a capy of his authorization in his hand, and I would have to have a secondary once in 23 my office. Was any of this done?

Giese - direct

A I have no authorizations at this time.

If these three ads were submitted to you for authorization of any co-op advertising support, would that co-op advertising support be granted?

No, they would not. Now there is a system, my service merchandise, my service merchandising ad man would get the advertising first. He would go through the ads. We would take a look at the advertising that is there and he would bring me up to date on any ads that may be very flagrant violations of our co-op policies. Then I would have the opportunity to go through those and if for some reason my service administrator and myself missed the ad, it would then go to the corporate counsel in knoxville who would review it for the same legal technicality I would review it for the same legal technicality I would review it for.

MR. ANDERSON: Thank you. No further direct, your Honor.

THE COURT: All right.

MR. ANDERSON: I would like to offer Exhibits 24, 25 and 26 into evidence at this time.

THE COURT: Any objection?

MR. VITTUM: No objection.

THE COURT: None.

MR. VITTUM: No.

THE COURT: They are admitted into evidence.

Giese - direct - cross (Thereupon said Defendants | Exhibits 21, 2. and 26 were admitted into evidence.) CROSS EXAMENATION BY MR. VITTUM: 4 5 Mr. Giese, when you received the October 27 memorandum from Mr. Hafner which your receipt stamped copy 6 7 has been marked as Defendants' Exhibit 24, you underst od 8 at that time that the concern was about associating the Pac-Man name with the K. C. Munchkin cartridge, didn't you: 10 That's correct. 11 Q .. Even though the reference to Pac-Man as a 12 trademark didn't actually appear in Defendants' Exhibit 24, 13 the memorandum, is that right? 14 That's correct. 15 Q . Are you familiar with the local video outlet 16 known as Showtime Video? 17 A Yes, I am. 18 Q Let me show you an advertisement from the Chica. 19 Tribune, Friday, November 27, 1981, section 4, page 16. 20 This appears to be an advertisement for 21 Showtime Video referring to the Odyssey system, the 22 Odyssey cartridges and the K. C. Munchkin cartridge, and .23 I quate: "The game as challenging as Pac-Man!" 24 You've seen that ad before? 28 A Yes, I have.

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MR. ANDERSON: It's in parentheses.

MR. VITTUM: There was an exclamation right

before the end of the parentheses.

BY MR. VITTUM:

Are you familiar with that ad, sir?

A Yes, I am.

THE COURT: What is that exhibit number?

MR. VITTUM: It's Exhibit No. 19, your Honor.

THE COURT: Plaintiffs' Exhibit 19.

MR. LAGOD: That's correct, your Honor.

BY MR. VITTUM:

I also will show you a document that I have marked as Plaintiffs' Exhibit 18.

MR. VITTUM: That's 18, your Honor. I have an explanation for this. It has a mailing label with my name on it. It was waiting at my house when I got home last Wednesday, and I apologize to the Court because there is some handwritten notes on there.

THE COURT: Show it to Mr. Anderson. If they have no objection, I don't have anything to say about that. Let's see what Mr. Anderson has to say.

MR. VITTUM: I am simply going to say my children wrote some notes on there for their Christians list.

THE COURT: They may not have any objection.

Glese - cross

If they do, we will listen to it.

MR. ANDERSON: The notes are apparently in red and circled are some items.

THE COURT: If there is any objection to anything, then we will discuss it. I suggest to you you find a way to erase it and delete it. It's a very simple thing to do, ordinarily. Maybe an eraser will take care of it.

Otherwise, any kind of ink will take care of anything that's been added to it.

MR. ANDERSON: I think we can live with the red markings.

THE COURT: All right. Let's proceed now.

MR. VITTUM: I just want the Court to know the red markings were not on it when it was received at my house.

THE COURT: All right.

BY MR. VITTUM:

Q Now let me show you Plaintiffs! Exhibit 18 for identification.

I ask you if that appears to be an advertising piece for a retail chain known as Video, Stc., with outlets in Deerfield and Skokie?

- A . It appears to be that.
- Q And it also lists the Odyssey II system, and it

Giese - cross

Lists the new games for the season and refers to the K. C. Munchkin cartridge as, and I quote: '(a lac-han

THE COURT: Mr. Vittum.

MR. VITTUM: Yes.

THE COURT: I don't understand why is it necessary to take up this time to ask Mr. Giese what that document contains when I can look at it. You can look at it. You don't have to take up time with the witness about a document.

If you want to offer it in evidence, see if there's any objection or if there is a stipulation to admit it. I can look at it and see what it says.

Admit it. It isn't necessary to ask a witness these questions.

MR. VITTUM: Thank you, your Honor. That was my last question for the witness.

THE COURT: Well --

THE WITNESS: May I comment on that.

THE COURT: No. Wait and see if Mr. Anderson has any questions of you.

Do you have any questions, Mr. Anderson?

MR. VITTUM: Let me just offer Plaintiffs!

Exhibits 18 and 19.

THE COURT: Any objection to Plaintiffs' Exmitts

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MR. ANDERSON: Your Honor, no objection to Plaintiffs' Exhibit 19. With respect to Plaintiffs' Exhibit 18, it's undated. I have no idea when it was prepared.

THE COURT: What is the purpose of offering --

MR. ANDERSON: And I do object to it.

THE COURT: -- this exhibit. 19 is not objected to. It's admitted into evidence.

(Whereupon said Plaintiffs' Exhibit 19 was admitted into evidence.)

THE COURT: What is the purpose for offering 10:

MR. VITTUM: lo is another advertisement passed through the mails illustrating a retailer using a -- the name Pac-Man for this game.

THE COURT: The objection is overruled. It's merely to show that somebody else out there in the world of business has issued that document.

MR. VITTUM: Thank you.

THE COURT: It's only for that purpose.

MR. VITTUM: That's all.

THE COURT: All right. It may be admitted.

(Whereupon said Plaintiffs' Exhibit 18

was admitted into evidence.)

MR. VITTUM: No further questions, your Honor.

Giese - redirect Ħ THE COURT: Anything else of Mr. Giese? MR. ANDERSON: Yes. 12 3 REDIRECT EXAMINATION BY MR. ANDERSON: A Mr. Giese, I would like you to look at these two 5 exhibits, Plaintiffs; Plaintiffs' Exhibit 18 and Plaintiffs' 6 Exhibit 19. 7 8 With respect to Plaintiffs' Exhibit 18, 9 did you or as far as you know, anyone associated with TO Magnavox authorize the reference to Pac-Man in association 11 with K. C. Munchkin as indicated on that exhibit? 112 A .. No, that was not authorized in advance. There 13 is no Magnavox co-op on an item such as that, and I have ned 14 a conversation earlier with Video, Etc. on an ad that was 95 also run in the Chicago paper referring to it as K. C. 16 Munchkin as a Pac-Man-type game. 17 I personally picked up the phone and talked 18 to them, and I told them that it was not to be advertised 19 as anything other than a K. C. Munchkin cartridge. 20 Q I notice this ad was -- that's Defendants' --21 Plaintiffs' Exhibit 18 indicates that the prices are good 22 through 11-30-81. Do you know how far back this particular 23 piece was prepared? 24 A No, I do not. This is the first I have seen this.

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23 3a With respect to Plaintiffs' Exhibit 19, Showtime Vider, did Magnavox in any way authorize that ad?

No, it was not authorized, and Showtime Video is a subsidiary of Minnesota Fats.

- Was any financial support authorized or any --
- None whatsoever.

MR. ANDERSON: No further redirect.

MR.VITTUM: Nothing, your Honor.

THE COURT: Thank you, Mr. Giese.

(Witness excused.)

THE COURT: You have another witness,

Mr. Anderson?

MR. ANDERSON: No, your Honor, I don't. I wonder, though, if perhaps the best witnesses aren't the Fac-Man and K. C. Munchkin games. Would you like --

THE COURT: Just wait one minute now. I just want to know from the defendants if you have any other witness to call.

MR. ANDERSON: No, your Honor.

THE COURT: All right. Then all the exhibits offered by the defendants are in evidence. My notes show that. All the exhibits down to and including Defendants' Exhibit 26.

All right. Any rebuttal, Mr. Vittum?

MR. VITTUM: No, your Honor. No rebuttal.

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Honor.

THE COURT: All right. Then all the evidence is in, is that correct?

MR. VITTUM: . I believe so, your Honor.

MR. ANDERSON: Yes, your Honor.

THE COURT: All right. Now how much time are you gentlemen going to require or desire to summarize this matter for the Court, and before you answer my question, let me tell you that it's now 12:20. I have another case which was set a long time ago to begin at 2:00 o'clock. Tell me how mucy time you need to argue this matter in summation.

First, Mr. Vittum.

MR. VITTUM: I would believe 15 to 20 minutes, your Monor.

THE COURT: All right.

MR. ANDERSON: That should be satisfactory, your

THE COURT: All right. Well, then I can hear you in summation now.

what I am going to do is adjourn these proceedings, and I am going to try to decide this matter temorrow morning between 9:00 and 10:00 s'clock in the morning because I have to look over your proposed findings of fact, and I will decide this motion for preliminary injunction temorrow morning. I am going to have to hope that I can get the writing that I have to get done this

afternoon in order to do it. I will hear you in summation now.

We will then adjourn these proceedings until 9:00 o'clock tomorrow morning and I have one or two questions to ask of you. First, let me make one thing clear.

For the plaintiffs, Mr. Daniel W. Vittum, Jr., will be responsible for all the originals of the exhibits, and Mr. Theodore W. Anderson will be responsible for all the exhibits, that is, the originals of the defendants.

MR. ANDERSON: Thank you.

THE COURT: I have some of the copies here.

Mr. Grice, will you return these to

Mr. Anderson.

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MR. VITTUM: Your Honor:

THE COURT: So each side will be responsible for the original of the exhibits.

MR. VITTUM: With one exception. I think we both marked the Pac-Man machine. Since it's Mr. Anders n's machine --

THE COURT: I understand that. We know there is a Pac-Man machine marked as Plaintiffs' Exhibit 1. It's also Defendants' Exhibit 14, and there is that considered by both sides, isn't that correct?

MR. VITTUM: That's correct.

THE COURT: All right. Then the record shows that.

Now with regard to these two -- these vital exhibits in this proceeding, and that is the Pac-Man arcade video game, which is Plaintiffs' Exhibit 16, Defendants' Exhibit 14 and the console, did you want to do something with those? You said something about it, Mr. Anderson.

MR. ANDERSON: Your Honor, on Wednesday you indicated an interest in actually getting close to the games.

THE COURT: Let me tell you what I have done.

I have looked at -- I am looking now at the odyssey consule, and that's what is referred to as the Odyssey 2.

MR. ANDERSON: Yes, your Honor.

THE COURT: Well, I am looking at it now, am I

not?

MR. ANDERSON: Yes, your Honor.

THE COURT: And I have also seen, I have seen the Pac-Man game. It's been displayed a number of times, and it's also Plaitiffs' Exhibit 4.

MR. ANDERSON: Yes, your Honor.

THE COURT: Except that Mr. Averett has said something -- no, he spoke about the K. C. Munchkin rendering of the K. C. Munchkin maze as being Atari's rendering.

MR. ANDERSON: That was in -THE COURT: But I have seen the K. C. Munchkin

maze, and I am looking at it right now, and I have seen the Fac-Man maze and one of the characteristics of these two video games which is obvious is the Pac-Man arcade video game only has one maze.

MR. ANDERSON: Yes, your Honor.

. THE COURT: And the Odyssey 2, K. C. Munchkin cartridge, when used in that console produces, as I was told, seven.

MR. ANDERSON: Actually, I think, more than that, your Honor.

THE COURT: How many more?

MR. ANDERSON: Well, there are, I believe, and you might have to have Mr. Averett explain this but there are different mazes on the programmable mode where the owner can make any maze he wants. Then --

THE COURT: But one of them, in any event, one of them is this one I am looking at now.

MR. ANDERSON: Yes, your Honor.

THE COURT: And I take it, this is the one that the plaintiffs claim infringes upon Pac-Man's video game.

MR. ANDERSON: I won't speak for the plaintiff.

THE COURT: I assume that. I can hear you,

but I have looked at these two, and I have them right here.

Is there anything else.

ME. ANDERSON: No, I think we used in cross

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examination of Mr. Moone, Plaintiffs' Exhibits 4 and 12 which we compared side by side.

THE COURT: Yes, I have it right here. I have both of them right here, and it's Plaintiffs' Exhibit 12 that Mr. Averett suggested is not accurately the K. C. Munchkin maze. The one that I am looking at.

MR. ANDERSON: I believe it was Plaintiffs' Exhibit 6 Mr. Averett said was not accurate.

> MR. VITTUM: It was the magazine advertisement. MR. ANDERSON: The magazine advertisement, not

THE COURT: The magazine advertisement which he thought was more Atari's rendering than the actual maze,

as I am looking at it now.

MR. ANDERSON: Yes, your Honor.

THE COURT: All right. Let me find --

MR. VITTUM: Your Honor, did you want a copy

of Exhibit 6?

THE COURT: Well, I was looking to see if I had

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the --

MR. VITTUM: I believe --

THE COURT: And I don't have it, for some reason.

MR. VITTUM: Here. It's not a marked copy,

THE COURT: All right. Is that an original? but it is the --

MR. VITTUM: Yes.

THE COURT: Is that the original exhibit?

MR. VITTUM: No, 1t's an extra copy, your Honor.

THE COURT: It's an extra. I don't want you

to give me any original exhibits.

MR. VITTUM: I understand that.

THE COURT: Mr. Grice, will you staple this

together.

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THE CLERK: Very well.

THE COURT: Now how do these things --

MR. ANDERSON: There is one column on the second

page on the left side, your Honor, which goes -- no, on the other side, the left-hand column.

THE COURT: Oh, this right here.

MR. ANDERSON: It lists all of the games ofyssey

offers.

THE COURT: Will you staple this.

THE CLERK: Yes.

THE COURT: This is Plaintiffs' Exhibit 6.

MR. VITTUM: Plaintiffs' Exhibit 6, your Honor,

yes.

THE COURT: All right. Let me ask a question

of Mr. Vittum.

MR. VITTUM: Yes. THE COURT: Which of these pages in the Odyssey

to use your expression which I heard you use a number of times here, which is so substantially similar as to show copying?

MR. VITTUM: That is exactly correct, your Honor.

THE COURT: All right. I want to be sure we understand we are using the same terms. Now which one of these K. C. Munchkin mazes is accused by the plaintiffs as infringing the Pac-Man maze?

MR. VITTUM: All right. It is the maze that I have just generated by pressing the reset button and -
THE COURT: Mr. Anderson, will you state for the record what is it Mr. Vittum is doing, so you will

MR. VITTUM: And I am now pressing the zero button along the numbers, and it is the --

THE COURT: All right. The maze which now is shown.

MR. VITTUM: That is correct, your Honor.

THE COURT: Let me ask another question. Is it claimed by the plaintiffs that there are any other mazes in that cartridge that infringes Pac-Man, that I have referred to, and which is Plaintiffs' Exhibit 4:

MR. VITTUM: Yes, your Honor. We substantial that all of the mazes that are produced in this game represent

agree.

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Vittum - closing

an infringement or are so similar as to demonstrate copying.

It is also our contention that this maze is the most similar, and it is the one that has, at least in the Atari's conceptual form, it is the version that has a period in the advertising and in the instructional booklet.

THE COURT: All right.

MR. VITTUM: Will you hear us now in argument, your Honor?

THE COURT: Yes.

MR. VITTUM: Thank you.

WHEREUPON THE FOLLOWING CLOSING ARGUMENT
WAS MADE ON BEHALF OF ATARI AND MIDWAY CORPORATION BY
MR. VITTUM AS FOLLOWS:

MR. VITTUM: May it please the Court.

THE COURT: You may proceed.

MR. VITTUM: Your Honor, plaintiffs submit that we have established on the evidence all the elements required for preliminary injunction for relief for environment, and for unfair competition and deceptive right infringement, and for unfair competition and deceptive practices. As to the copyright claim, the copyright statute, 17 U.S.C., denotes the scope of protection. Section 501 of the statute, and I have for the Court photocopies of the public law having the basic provisions copies of the public law having the basic provisions

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What he says is that it to infringment to wintely and of the uncluding right; of copyright given to the copyright owner in Sections 100 through 100 of the copyright Statute - For purposes of this hearing and ship proposing, as assistantly loub at Section 106 of the Code which, in its terms, gives the copyright owner the right to produce the copyrighted work in copies, the right to prepare derivitive with handed on the copyrighted work, the right to distribute nuples and the sight to display and perform in the suse of an audio/visual work, such as, this.

A showing of violation of any one of these rights than represents infringement under the Copyright T. ac. ... Dach are independent acts of infringement and ran, independently, support the injunction that is here sought

As the Court had several times pointed out, the roal question for determination hard is the lases of reging The issue of the similatity of the audio, wineal content of the two games. This is especially true here where a validity of the copyright is unchallenged for purposes of this hearing. and it is also especially true here where the defendants admit their prior awareness of the Pac-Man and hence, have admitted access to the copyrighted work.

Cases have made clear that copying within the meaning of the statute can be shown by the statute can be Substantial similarity. The cases go intime in the

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establish a relation to the same of the sa gillstanting, giarlarity. Where no access is shown, an extraordinary degree of similarity produces an informer that the opened for anything become but in a case such as the where awareness and access to t copyrighted man is shown in the myddening the proof of similarity have not not not prome up where a complete and the

Finally, from the case law standpoint, your Honor, the sames make slear that the acousts to make the of the ordinary observer. It is not the skilled, the trained, the expent, and it is not the object of the It is not even the columnist who writes columns about arcade games. It is the ordinary observer. The test is whether the ordinary observer wealth file of the terms of the continuous and t eratuary observer it would be referred been derived from the copyrighted work.

would call to the Court's specific attent of the cases we cited in our memorandum. It's the Sid and White Wrel. same against McDonald Corporation at 562 F. 2d 1157 "har case is very instructive for purposes of this case because that case involved a claim by the owners of the English and a continue to terminate and the terminate and the second completely had meet good like on the special company of the its advertising of the constant of the The case is interdited to the case of the case of

involves a change of medium. There the change from a televisimily program to an advertising format. Here we have a change in medium from the arcade games to the home video games.

The case is also instructive because it was a case where access was shown, butters just as and the star here. There was an impair, to the compression properties and investigate permission or a license, just as here, and no license was obtained. The infringement took forward. Just as here, the Court applied this inverse relationship in the quantum of proof between similarity and access, and pointed out that a legast degree of similarity need only as soon a est Lecause access was so clear, and finally, and seek to important because the Winch Circuit Court of Approla in that addition declined to permit the defendant to dissect the department work into individual characters and them to point out details of crothing, colors and features, and then to anythe that there had been no violation of copyright.

The Court pointed out the impression of work as a whole to the ordinary observer

THE COURT: Where do you say that case is cited? MR. VITTUM: It's cited in our memorandum of law, your

Honor.

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THE COURT: All right.

MR. VITTUM: I have a copy of the decision here which I will hand up to the Court, This to the highlighted terror. of the case, your Honor.

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MR. LAGOD: Your law clerk was provided with a copy earlier today, your Honor.

THE COURT: Oh, yes, I have this.

case answers many of the contentions that the defendant has advanced in its effort to demonstrate noninfringement of the K. C. Munchkin game, but as to the primary question of similarity, it's not as the Court has noted. It's not a question of law, it's a question of fact. It's a question of observation of the games themselves, the audio/visual presentation and their play.

The testimony of both sides, the witnesses has

empleaded the principle areas of state and appearance,

the similarity in character, the similarity in play of the

jane, the similarity in scoring and even a similarity in

strategy. Both sides' witnesses have noted that the games

both involve a central gobbler character who moves about

both involve a central gobbler character who moves about

goblin monsters. Both sides' witnesses have noticed that

goblin monsters. Both sides' witnesses have noticed that

goblin monsters involve the company of a special dot which, when

both games involve the company of turns the tables and

consumed by the source the monsters and to score

percent the monsters and to score

Both sides' witnesses have pointed out the similarBoth sides' witnesses have pointed out the similar-

Indeed, the defendants' expert, Mr. Kunkel, said that ". C. Munchkin was, and I quote "obviously inspired by Pac-Man."

Mr. Kunkel also noted that Pac-Man was, and again
I probe "Ladi: world the must popular edia-special gard."
Mr. Kunkel noted that there were only superficial slight
differences in the ghost characters in the two games, and
in listening to the sounds of the K. C. Munchkin game and
the Pac-Man game, he noted that the sounds were minimar as
well.

Mr. Kunkel's principal area of difference dealt with some rather sophisticated notions of strategy that a skilled player would know, but that type of difference does not meet the ordinary observer test of one looking at the games as a whole, and of the two, you would form a conclusion as to the similarity or dissimilarity.

Even more importantly, here we manifest to the form on the salf-evident similarity of the two games, your Honor.

Here we have North landage phillips' made at the following the sale of the K. C. Munchkin game well. Morth American Phillips, while the K. C. Munchkin game was being developed, sought a license from Milway. North American Phillips, after the development perhitted to American Phillips, after the development perhitted to

make the characters more different so that the Pac-Man or not what will also not longer yellow just as it is in the Pac-Man game.

North American Phillips, your Honor, accepted the problem that has occurred in the field at the retail level.

North American Phillips in a unique action, as testified

Ly in . Staup, ultimed a marning to the neglectal and Distribut than against pointing out that there are an important potential problem involving trademarks. They didn't even have to tell them that the problem and the they didn't even have to tell them that the problem and the last factor of these last factor of the facto

problem of similarity that has occurred here. Nor do we need be limited to that should be that should be the state of the

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like fixing the crossing gate on a railroad after the accident has occurred.

has occurred at the retail level strongly suggests how the relinary people out in the field perceive these two games. I think this South may result the twereath includer which make to this fourt from the Court of ippeals after the day's sion on the trademark issued. The Court of Appeals in that retail trade by Julye Northall the distinct of staffmin at the rotail trade by Julye Northall the distinct it, and the decision which was reversed by the Court of Typeals.

how important that kind of retail level confusion evidence is. We would submit that the evidence shows here in Chica, , and now in Los Angeles papers, is something that is totally and now in Los Angeles papers, is something that is totally be control of North American. It is a recognition of the control of North American of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits, your noner, and it is proof of the extreme importance visits.

As against this group of similarity, as I continued to a secretary primarily seeks only to dissent the carlier, North American primarily seeks only to dissent the game into little includes and point out that there are game into little includes of the games and there is a facility of the games on the shoulders of the games and there is a facility of the games on the shoulders of the games and there is a facility of the games of the

expression on the munching gobbler character, but that doesn't mitigate from the similarity of that creature when its open mouth goes about going after the dots. That's the expression of the name. That's the idea, and that's what's involved here. This whole action of idea versus expression which it. Anderson alluded to so frequently, you woner. I wink it is important that the Court put that in context.

That's true in any copyright case, as I argued earlier. It would be true in a motion picture work. It would be true in a stage play, but it's how that basic idea is represented.

Now we had Mr. Averett explain in his testimony
what the original concept was, and that was simply a maze
chase game where the central character would score points.

Now that's a basic idea. Now how is that idea expressed?

Now that's a basic idea. Now how is that idea expressed?

Will, it's expressed in the Pac-Man game by the central

Will, it's expressed for the Pac-Man game by the sequence with the

and gobblins. It is expressed by the sequence with the

and gobblins. It is expressed by the sequence with the

character who munches by munching the gobbline.

Character can score points by munching the gobbline.

Now those are all the expressions of idea, your

Now those are all the expressions of idea, your

that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between that all of the withesses have found to be common between the common betw

preliminary injunction ruling, the presence of conceded validity, the admitted access and the similarity shown by the games themselves, the witness' testimony, North American's conduct and the retail evidence show that ultimate success on the copyright chair is not hearly likely, and Honor, it's virtually certainty.

The remains for consideration are the questions of irrespond that we also plaintiffs from the conduct of the defendant. There is direct columns of many to the Plaintilf Acadi. The Wichesses from worth American I dillys, here today, your Honor, have made clear the considerable economic importance of launching this quae into the Unitation, market. Mr. Moone, when he testilled, the senter energially officer of Consumer discounted for Acad, Wr. Loud Mand clear his personal involvement had been required because of the large customers' such as, Sears and K-Mart, who had booked brders with Acari Lased on the appuration that Acqui has the exclusive rac Man Lone .11co game. Mr. Moone's fratilion, marca chair allue allies un nagia aug. les lass. cancelled, it's an absolute semballing that bittle brites will he cancelled and this lature discrewill be reliable if that premise of contestation does not had app. If the con-Mancakin game is not sufficient, the days is affecting certain.

K. C. Schchkin has sought to preempt the home

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referred/in the Los Angeles Times. There is not any doubt in anybody's mind what game was referred to. It's the Pac-Man game. K. C. Munchkin has admittedly tried, through its emphasis on new cartridges, such as K. C. Munchkin, to manistre it, sales un the "insternation of that the Joseph American Phillips sittlesses have indicated that once semabled, hurs that the triples is lost forever to Atari. In short, K. C. Munchkin, has attempted to appropriate the uncludivity in Pac-Man which Atari, in good faith, negotiated for and has agreed to pay dearly for.

If if there were no competition at all between frari and Odyssey, and ads that are before the Court June.

them set up side by side in comparison, but been if there was no competition, it is still important in product by injunctive relief the originality and specifically in comparison.

a motion picture is a different medium from a novel, the action picture is etill entitled to an injunction preventing the asset of his configuration is personal to be a persona

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light in this was we don't have to rely on that produce demonstrates the direct harm on Atari and Midway of the loss of the exclusivity in this Pac-Man game. The most popular arcade game now around. It also has i ...ct, as Mr. Paul testified, on the willingness Ji the creators to spend money to develop and license their creative works.

Finally, your Honor, as to the hardships, Atari has pointed out how it can be harmed by the loss of the right to introduce the genuine, the exclusive and the licensed Pac-Man home video game. As against this, we have Mr. Staup's testimony aggregating to a \$5,000,000 figure, but I would suggest that that figure is not the correct figure that the Court ought to look at. The Court should, first of all, look at the figure of \$900,000 which is the divertising commitment to K. C. Munchkin that, apparently, cannot be altered. Cartainly, in terms of public assertion, that can be charged may prickly. At least, they apparently estronaded Minaesota Feto to thempy his also were quickly or that the remaining 2202,000 of localler suppose on, it is

devoted to other small Jecondly, Joydony Loca Edica Sense Janier.

Prince were games. The Independ that a main an at.

Comment of the contract of the

to force them to of promote that wealth of other games, softendie for its odyssey 2 system so balanced against that, relatively minur hardship, but homor, we would submit that the plaintiffe' loss of and for having the preemption from the plaintiffs of this right to introduce what the market demand is waiting for, the genuine Pac-Man home video game, there's just no comparison.

In any case, I would cite to the Court one further Seventh Circuit decision, the Helene Curtis, case which we also cite in our memorandum. In that case, the defendant in a trademark case ought to avoid a preliminary injunction We arguing that it committed substantial famous for algorithing and promotion of the accused product. The Court of Appeals there noted that because of the deliberate conscious decision that had been made by the defendant in that case, the hardship that arose from the consequences of that deliberate and conscious decision could not be used to justify denial of a preliminary injunction. 50, 100, 1020. If the Court grant wiew the stipulations of facts

And the have entrye into, the Court knows that the parties have scipulated that the K. C. Margarith Tention was a deliberate conscious decision. It was a foreign With Lapwiedge of the Faction game, with access to the Bic-Man game and even in antique of the contract to Possible disputes with the owners of the Pac-Man trademark and

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copyright.

So, your Honor, I would submit any harm or hardship to the definitions fully into exactly that outogoty that the Court in the Helene Curtis case indicated should not be plyon asignt to. Judge, I would outsit that those is barlly the language in which the elements for public hear, relief have been more clearly shown.

Volintary is victim. Access is shown. The similarities speak for the implyer, and the haza to the plaintiffs in losing their exclusivity, in having the markst for the bonafide licunse that they have entered into prosupted is so much and so strong as to outwaigh any consideration on the lofendants' side.

Your Nonor, the Plaintiffs urgo entry of a proliminary

injunction. Thank 100. Your Ponor, I don't think I entirely consumed by

tire, T have a moment or two for letatest. THE COURT: No, you said l'a minutes. I was joint to

tell Mr. Anderson I may not be able to hear you today. It's now five minutes to 1:00, and I have another matter have,

and I have a case to begin at 2:00 o'clock. I want some time between now and him to bear

MR. VITTUM: Your Robor, I apologicalif t book longer now.

than I said.

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THE COURT: You said 15 minutes, and we started about 11 10. The saw five minutes to 1:00.

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MR. VITTUM: I thought I said 15 to 20 minutes, your Honor, but I apologize in any case.

THE COURT: If Mr. Anderson takes the same amount of time, I won't be able to hear this case now.

MR. ANDERSON: I had in mind about 15 or 20 minutes, your Honor.

THE COURT: Now let's stop here because I don't think I can do it. I or this bing ow of arking you to own hards this afternoon. I have to start a case at 2:00 o'clock which I set months ago, and remember that this case came in as an emergency matter.

MD. ANDERSON: I suggest, your Honor --

THE COURT: I tried to accommo tate the lempone and litigants in this case, but I have another matter which I set months ago and I can't delay that trial beginning at 2:00 o'clock.

MR. ANDERSON: T would suggest we come back if you would

THE COURT: Will come back at 5:00 o'clock. I will be available at all today.

hear you the rest of the evening.

MR. ANDERSON: I promise to limit it to 20 milloton. THE COURT: Let's adjaura these processings man't fire

O'clock this afternoon.

MIN TOTAL THEORY YOUR HONOR.

THE COURT: All right.

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(Whereupon an adjournment was taken until 5:00 p.m. of the same afternoon.) (The following further proceedings were nad and taken herein at 5:00 p.m.)

THE COURT: Mr. Anderson, you may proceed.

MR. ANDERSON: Thank you, your Honor.

THE COURT: All right.

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MR. ANDERSON: We have put together a binder of the unues that I will be raking reference to and I would like to hand up two copies to the Court if I may. I think it will help to thurten my presentation a bit. And also, we have aightly the cases to indicate the points on which we will primarily rely.

Counsel in his summation addresses his case in a simplistic way, referring to similarity of games, while Similarity of games is not, in fact, the issue here but it

THE COURT: Well I think, in fairness to what Mr. Vittum is saying, Mr. Vittum is saying, as I understand, it isn't Similarity of games; it is substantial similarity as a test of copying. I don't think he is saying that similarity --MR. ANDERSON: Your Henor, the substantial similarity that is not what he is saying.

Which is the test is the substantial similarity of the Profectable mate la', not of the entire device -- the veo-ectable material in only an audio-visual display. It is not a joy stick or maze.

The protecting material here, as I understand the new no march't gotten to and I don't suppose we need to, in this rotion - and you said something to alert me that I manted to ask about what was sabritted to the copyright office when the copyright registration but I must assume that whatever was substitled, something to this inc-Man muzz. That is what is protected, as I understand it.

MR. ANDERSON: Your Honor, one of the shortcomings here is that white was submitted to the traderark, the sopprint office, has not been displayed. I think there must be an assumption by all of us as to what was submitted. The coppright requirement is that a complete copp of the bast coppright requirement is that a complete copp of the bast edition he submitted to the coppright office. I will get to that momentarily with respect to what other Courts have to that momentarily with respect to what other Courts have

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But here, the point is, the audio-visual distance in the form be protected by the copyright and the co

that that expression, and as term and some difference of the subject of the subje

"Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself."

Now to try to see exactly what the Supreme Court indicates by that, we look to the cases that have followed it. We look to the new 1978 statute.

In Mazur vs. Stein at Page 218, the Court went on to state:

"The copyright protects originality rather than novelty or invention -- conferring only 'the sole right of multiplying copies.'"

In Durham Industries vs. Tomy, the second case
that we have sound in our book, is a decome thrule sace,

1980 case that your light to the point of games up 1980 or

toys. There, the accusal his a game that played mustly

toys. There, the accusal his a game that played mustly

the same. It had four levers to bounce a peanut or a salf

the same particular positions and that is what the plaintiff

ball into particular positions and that is what the plaintiff

copyright owner had done.

copying that was taking anything that was not take that was not that has been been all in that regard, at Page 913:

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"It follows that where the protected work and the accoused work shipress the same idea, ins similarity that inevitably stems solely from the commonality of the subject matter is not proof of unlawful copying."

And quoting a case, the Court went on:

"There is another, equally important limitation on the scope of copyright protection that must be kept in mind in assessing substantial similarity.

Just as copyright protection extends to expression but not ideas, copyright protection extends only to the artistic aspects, but not the mechanical or utilitarian features, of a protected work."

In this case, of course what counsel is arguing is protected is not the sesthetic but the play of the game, the strategy.

In the Durham case the Second Circuit went on at Tage 915, after describing the games and the fact that all that the accused did was changed the that the accused did was changed the characters and the colors and states:

"The feature of Tomy's games that have been "The feature of tomy's games that have been copied by Durham relates to the mechanical, utilitarian

aspects of the toys."

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The Court gons ... at Page 213.

"Young has simply failed to specify any sculptural features' or aesthetic elements of either that white, sould be identified separately from and callet independently of the attitudable mapped of the article."

In that case they were relying on, these were three almost and shop were relying on sculprural, radius than the audio-visual sattle of the Act, but the law is exactly the same in both cases.

The Court went on in describing the copyright and the accused products and stated:

"That the idea behind each toy is the same
is evident from a viewing of the toys, and the inference
that Durham conceived of the idea for its doll only
that Durham Tomy's toy is not an unreasonable one."

This included the dolls as well as the games. And the Court went on to specifically state:

Tomy dolls is their ability to walk or crawl, but it

sion of the art/utility distinction that but the mechanism that make walking or should be as well."

Your Honor, even the case that counsel has relied upon, the Sid and Marty Kroft the minimum and the limit to the limit of the limit of

"But there also must be substantial similarity, not of the general ideas but of the expressions of the ideas as well."

And they go on to discuss that specific point.

Now with respect to the statute, the statute defines an audio-visual work as I have just pointed out in the definition in 101, but the statute, in Section 102, goes on to specifically point out what is excluded, what cannot be protected by a copyright and of course that is equally be protected by a copyright and of course that is equally be protected by a copyright and of course that is equally

Section 100(L) of the copyright statute specifically precludes the assertions that are being made here today precludes the assertions that are being made here today precludes:

"In no case does compright protection for "In no case does compright protection for authorship extend to any last, an original work of authorship extend to any last, an original work of authorship extend to any last, an original work of authorship extend to any last, and or entropy of authorship extend to any last, and any

the work."

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the fact that ideas, consepts, methods of operation cannot be protected.

this case the game, of course, is being asserted as an addictional work and the table in that area are equally instructive. I mentioned this in my opening. And the plaintiffs here rely on the Drikschneider case and the Storn case but in those cases it didn't result in preliminary injunctions but in Drikschneider the Court said:

"For all practical purposes, the games are identical."

Precisely it says:

"Mighty Mouse and the plaintiffs Pac-Man games
were both, for all practical purposes, identital."

Exectly the same thing was true in Stern. The
Exectly the same thing was true in Stern. The
Exectly the same thing was true in Stern. The
Exectly the same thing was true in Stern. The
Exectly the same and the copyrighted game were
Court sail the accused game and the copyrighted game were
identical. That presents a totally different question than
identical. That presents a totally different question than
identical to in his same as the word.

The most that can be asserted in the use of an
The most that can be asserted in the use of an

idea or a concept.

Another case that the plaintiffs rely upon is the Another case that the plaintiffs rely upon is the Another case that the plaintiffs rely upon is the Case involving Krukenberg, Larry Krukenberg, decided Tall 4, hall in turing Company vs. Larri Krukenberg, decided Tall 4, hall in

faced a product that was accused and he said at here ; if the fulling which is bound in your book, your Honor, with respect to these games:

International Trade case, as I recall it, the Commission held that there was a copyright only in the attract mode and in the first instant of the play mode.

There is some question whether or not anything beyond that would be covered by the copyright. It is also questionable as to how much the copyright would protect copying of similar types of boards and of mode of operation."

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The Court goes on at some length and states:

"Because of the difficulty at this point

in resolving those issues, I limit the injunction to

the exact copying of those three electronic games,

the exact copying and pac-Man, as has been done

the Galaxian, Rally-Y, and Pac-Man, as has been done

in the exhibit which were demonstrated here before me.

in the exhibit with were capying, the changing

The mane pac-Man to Rac-Man still comes within

of the name pac-Man to Rac-Man still comes within

the name pac-Man to Rac-Man still comes within

are the cases on which the plaintiffs would

like to rely here and I submit, that much more to the point are the other two Midway cases that I mentioned during the opening statement and that is, for one, Judge Decker's decision in the Artic case, Pitway Manufacturing v. Artic decided June 2, 1981.

THE COURT: By the way, what happened in that case? He unly danied the motion for summary judgment, disalt are

MR. ANDERSON: Yes, your Honor, that's correct.

THE COURT: What happened after that?

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MR. ANDERSON: I do not know the present status of that case.

MR. VITTUM: Would the Court like to have that information?

THE COURT: Just out of curiosity, what happened after that?

VI VI The matter is now pending before Judge Decker on the fully briefed and submitted motion for preliminary injunction by the plainties, widowy.

THE COURT: All right.

MR. ANDERSON: Tidge Decker there said: "put another way, plaintiff has apparently attempted to the audio and visual expressions of its game. Thus, for example, it may have copyrighted the shape of the aliens, what they look like and how they move. Certain other aspects of the game, of course, I mentioned in opening, into Universal case that

Cimpuny, Limited, the Control District of Cilifornia, legided

July 24, 1980, Judge Waters in California was faced with a

case which did not involve slavish copying of the type that

I referred to earlier.

There, Judge Waters stated, and this was with respect to two other Midway games or the game Galaxian, Judge Waters said:

"Cosmic Alien and Galaxian have the same general elements; each game features a disply of aliens which move in formation and drop missiles aimed at a ship controlled by the player. Each game also features a ship controlled by the player. Each game also features aliens, which break out of the formation and invert and aliens, which break out of the player's ship. Both games to attack the player's ship. Both games group down to attack the player's ship.

while the formations taken by the figures in while the formations taken by the figures in each game are similar, the shapes and the colors each game are similar, the shapes and the colors displayed in each game are somewhat different.

displayed in each game are somewhat different.

displayed in each game are somewhat different.

before are similar, the shapes and the colors are somewhat different.

displayed in each game are somewhat different.

before are similar, the shapes and the colors are somewhat different.

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before a color of the each game are somewhat different.

displayed in each game are somewhat different.

The Court Went on and this is all in the bound

"Countered Allan is sat in outer success."

"Countered Alland has tailed a relocal productions of the elements of alaxian for which plaintiff seeks to relate the unsettlened are general arinotyles of the game and are the satisfication.

The protectable. The satisfication are her investigation and the satisfication of the game and are the satisfication.

the statutory specific anclusions of any state of any sta

You have heard great to the continue are shall aritics to the continue to the continue of the

is not subject to copyright protection.

The concept of special dot is one that specifically was mentioned in the summation. The concept of a special dot in K. C. Munchkin is a very different, even a different consept, lot alone a different expression, a concept of a moving dot, in contrast to a fixed pattern of a pattern of a dots.

The concept of a gobbler chasing dots was mentioned by counsel. That, of course, is part of what has been referred to in the other cases as what is trailing and is not protectable material.

and then he mentioned incremental scoring. The seoring is again different but even if it weren't, the audio-visual display has nothing to do with incremental audio-visual display incremental scoring cannot be protected scorin; and pertainly incremental scoring cannot be protected scorin; and pertainly incremental scoring cannot be protected.

Of course the sounds are completely differ.

The only other similarity that was mentioned in the summation was the written of the similarity that was mentioned in the summation was the written of the side of the side of the back in the course every witness indicated on the other side. And it extremely common and the course that wraparound had it is merely because in a many that wraparound had it is merely because in a many that wraparound had been also as the term.

it is a part of a function of the game, part of the method of operation. It is not a part of the audio-visual display that is proper subject matter for protection under the copyright laws.

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was addressed by counsel in his summation, there has not been a single instants of confusion. There has been confusion. There has been no unfair competition. I think it is clear that to the contrary, there has been a very sincere effort to avoid any possible confusion or unfair competition and the record have shows that evaluate in a variable from Mills of evidence of any effort of palming off. The scintilla of evidence of any effort of palming off. The record, of course, is just to the contrary.

who did the shapeing, Mr. Gallo, testified that when you go
who did the shapeing, Mr. Gallo, testified that when you go
into the store, the Atari cartridges are in one rack down
one row and the object cartridges are in another rack down
one row and the object cartridges are in another rack down
the ads that plaintiff would make
the ones that Minnesota Fats ran,

The als, the ads that Plant would make the als that Minnesota Fats ran, in the ones that Minnesota Fats ran, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, in the ones that Minnesota Fats ran, it clear, it clear, it clear, it clear, in the ones that Minnesota Fats ran, it clear, it cle

Odyssey console and everyone involved has made that clear and that is the very antitlesis of deception, the very antitlesis of deception, the very

Finally, with respect to the question of irreparable injury, your vanor, there has been no showing that Milmay or Aturi will be injured by the continued sale of W. C. Manantin of a cartridge for use in the Odyssey 2 consoles.

Counsel argues:

"It is an absolute certainty that orders will be cancelled."

asked Mr. Mosne about that, he di'n't ever suggest even that a customer said he might cancel. He said they asked about the exclusive rights. He never suggested that there was a risk of any cancellation of orders or that any customer risk of any cancel orders. That argument is totally indicated he might cancel orders. That argument is totally unsupported by the evidence.

Counsel also argues that irreparable injury is to

be presumed and I submit, four Honor, that that is not correct

in copyright cases of this kind and that is for the believe it is

One, I question the likelihood of success. I believe it is

One, I question the likelihood of success. But also, that particular

just the contrary, the I submit that. But also, that particular

just the contrary, the like harmal capyright that and I should

dout rine is referred to the harmal capyright case. It is a very different

this is not the normal capyright case. It is a very different

ritualism and it is not a book or a motion picture film. is a new concept of religit protection and I submit that this case should he per record for trial at the earliest

On the balance of hardship, Mr. Staup made it very clear how Odyssey and his company would suffer in very real dellars to specific flyares and to era warptiment in thos. Mr. Moons menoly appeared thout what might have the give no figures. He gave no specific evidence.

And even with respect to the presence of an Atari cartridge on the market, there apparently is no plan to bring out an Atari cartridge before next year, sometime in the spring, and I submit that any slate of imagerable lajury or damage at this time is misplaced and can't be supported. I submit. your Honor, that this motion should be

denied.

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, And I thank you.

MR. VITTUM: Your Honor, I will try to be very brief. Tirst of all, to respond to the Court's question about what was submitted to the copyright office, what was Dubmitted to the solver of the Play of the Pac-Man . . . The reason we did not submit that in evidence is that we contained an agreement and a stipulation of the number two of which is that the audio-visual work covered by the copyright is a series of images which

which appear on and telecision screen of Midway's Pac-Man coin-operated video game.

THE COURT: Which consists of the maze.

MN. TITUM: It consists of the maze, your Honor, but net only of the mase, it is the styling --

THE COURT: I understand that. But what you see when Jou look at Pac-Man, you see the maze and then you see all the rest of it and that is wint you must submit because there is nothing elect to subsit. There is no other expression in Pac-Man.

MR. VITTUM: That's right, your Honor.

THE COURT: Than that.

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MR. VITTUM: The only thing I would say is, it is not

the maze at one point in time. .

THE COURT: Well, I know that.

MR. Virich: It is the sequence of things over time.

THE COURT: I know that. I know that.

MR. VIITUM: All right. Then the Court is absolutely

correct. That is correct.

THE COURT: One of the difficulties in this case and 1 Suppose you gentlemen who litigate these cases will cope

with this difficulty.

Lagrance known as additionvisual games. I went back to look

and I couldn't need but them that when topy right protects without regard to form or medium.

ind 1976 securinant to the Curyright has allery to continue deliances in technology that create these many forms of expression. When the copyright law was first enacted in 1790, all they been thinking about our puems and probe and what came out of a printing press. That's all they were thinking about.

Since then, there have been all these technological than gas and this new phenomenon of window gas to which terms contamporary tooknowing to phonomenous lands a somplantly to this whole idea of expression. But the expression which is protected by copyright is what you see in that screen from the logimning to the end of the play. That is the emphassion.

MR. VITTUM: That's right, your Honor.

THE COURT: And so the question here is whether or not there has been a copying of that expression.

That's right, your Honor. And one has to che the traditional necions of access and copying and similarity and we tried to do that, and to point out to the Court how these traditional tests that have evolved in other cases apply in cases just soon as this.

And so 2 would respond to the arguments that counsel

alvances concerning on the other hand, and expression on the other hand, simply by hoting that the defendants' own witness, Mr. Averett, described of the K. C. Munchkin game was, when he

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referred to i. chase game. If that is the basic idea, there are a large variation of function with the idea and har expressed. To take one extreme, one can take Mr. Averett's own Take the Money and Run game where he has characters battling computer during its to score points for

Another approach, one that was taken by the author or originator of the Pac-Man game was to express that idea in count of a year havin, a made when fore and a partie. character with a number which your occurs one was something the dots, introducing the sequence of events or scenes where the reversal between the thating floots or public and records, the numbhing distactor that books -- all of close, year Homor, we would suit to restingly like to prosite again, and of a motion picture and the test of infringement involving a Mution picture involve determination of similarity in character. and submos and sequence of events.

so we would sulvit the transmitted to the sulfit and and inne are exactly the kind of analysis the Court can use in making the determination that he are marry in applying the

in these new to head advances. so we want amount that it is not as along a motorin laying, as counsel has suggested, thus allowers and home "it " lished in Star Table 1 are normal cases, that somehow This is an abnormal case in a mid not be treated the same.

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I don't think that is the.

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The came constitutional mandate for protection of creativity ought to apply here just as it does in the case of a motion picture or in the case of

25, we would submit that this limit of outjour matter and the expression of it in the manner that to have Shoun willy the laction yans in what we but it is in the same similar expression in the form of the K. C. Munchkin game, Cui - - dangly. I amada tabut tabiblional palaraphas as take when those traditional principles are applied, a finding of Enfringement is Very bighty likely in this throughten.

Working from the same analogy to a metion picture, your Honor, we would point out that the cases have shown that for an inflingement of a motion picture, for example --

THE COURT: The danger, Mr. Wittam, the damper of tryin, to use that analogy is that a motion liberty expresses - ... the totality of the scenes of a motion picture is an expres-Sion 35 a story. It tells a plot and the whole thing is Veilel in a series of addio-visual conceptions and it tells a story. A motion pictual tells a story, which is the thing that the copyright tects. It is the expression manifested of a motion picture and that

1 10n't mind tolling you that I find using that to is what the copyright process.

to Late that I have grappled with this subject, that is, the subject of copyrights and expression protected by a copyright when you get to applying it to this arcade game here, it is a different process.

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But go ahead and finish this because I want to conclude this. It is almost 6:00 o'clock.

MR. VITTUM: Surely. Just one or two more comments, your Honor.

As your Honor knows, you are not the only Judge that has been forced to grapple with this problem and there has been extensive discussion of the issues that raise exactly the issues the Court has raised in the Drikschneider exactly the issues the Court has raised in the Drikschneider and Stern cases which are important recent and very thorough and Stern cases which are important recent and very thorough analytical decisions that discuss the whole question.

THE COURT: Well, but Mr. Anderson points out -- I have looked at both cases in the time that I have had. When looked at both cases in the two games are identical, you know, it one can say that the two games are identical, you know, it one can say that the two games are identical, then it seems to be the problem is easy. The problem of determining seems to me the problem is easy, that is visually identical. Those easy, that is visually identical. Those to me the problem of them, I think is constant the say, is an analysis of them, I think is constant the say, these are identical. And so the say, the say, these are identical. And so are the say, the say, these are identical.

iding identification and different to see that there was

MR. VITTUM: Your Hono: ..

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THE COURT: I will lack at it when you have finished here.

Mn. WITTUM: Let me just say that in respect of this very same copyright that is here in issue, copyright covering the audio-visual work in the Pac-Man game, it has been extensively litigated. There has been no decision and process to the validity of that copyright. There has been as decision adverse to the scope of that copyright, your Human, and subte has been no decision denying preliminary injunctive relief.

THE COURT: Well, but Mr. Vitnum, while a stauta now. What you are telling me has nothing to do with the issues I am faced with here.

Here is this case there is no dispute about the validity of the departable.

MR. VIETUM. That's right.

THE COURT: For the purpose of this notion, the validity of the copyright is not at issue. The question is simply Infringement, has it been infringed? The cases you are talking about didn't involve these two, that is, didn't involve this accused game.

MR. VITTUM: That's Milit. THE COURT: put that is an entirely different matter. that every step notice; was taken in this convergit registration and the grace tion of validity The resumption

So, the fact that the Par-Man, ampringer has never son larlaged invalid, which is probably a row sero strument to make -- tan't the

MR. VITTUM: That's right.

THE COURT: As I understand it, there is no case that has held that the Pac-Man copyright is invalid.

MR. VITTUM: That is not true, your Honor. It was held Valid in the Drikschneider case by the District in Nebraska. Validity was challenged in that case and it was adjudicated favorably to the copyright.

THE COURT: In the final judgment?

MR. VITTUM: It is on a preliminary injunction, your

THE COURT: All right. Wait a minute now. That is a different matter How. Just because the injunction was granted but there wasn't a determination of validity there, was there: MR. VITTUN: There was a determination of the issue of

Villity as it bore on the likelihood of success. Lat as I told you, within the

The case went to trial -- the case

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hasn't gone to trial on the merits, is that right?

MR. VITTUM: That is correct. THE COURT: Well, we have to wait. We have to wait. We don't know what may happen between now and the time final judgment is entered in that case. We don't know. It would be different if there was a declaratory judgment that the Pac-Man copyright was valid, and I suppose it could only be valid in the context of the suit involving some accused game, I suppose.

All right. MR. VITTUM: I would only suggest to the Court that in grappling with the question of copying, on the exact facts of this case, that the Court should bear in mind both its own observations of the similarities between the games, the characters, the audio-visual display, plus the testimony of the witnesses which the Court has heard at great length and Which I do not propose to review again, and on the basis of that evidence, we would submit there is a substantial similarity under the law and that in applying the analytical framework given you by the other cases, that success is likely and that infringement has been shown. Thank you, your Honor.

THE COURT: All right. MR. ANDERSON: Your Honor, could I make just one factual Point that I think won't be disputed?

It was suggested that the complete copy of the best edition filed in the copyright office showed the play. I was given what I understand was a copy. It has the attract mode, a one-player sequence and a two-player sequence -if I understand what you game me, Counsel, is that correct? MR. VITTUM: I believe that is correct.

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MR. COHEN: Your Honor, I represent Midway and we have litigated this matter in many jurisdictions. Because we have a stipulation here that the copyright is valid for the purposes of this hearing and that what is protected is the audio-visual work, what is on that video tape really has nothing to do with what is before the Court and if we were going to litigate that; we would put in what the copyright office considered the video tape to be.

THE COURT: But I assume you did, in this case, what every registrant of a copyright does.

MR. VITTUM: Surely. That is correct.

THE COURT: But there is nothing easier in the world that I know of than getting a copyright. I can't think of anything easier because I have had things copyrighted. I have obtained copyrights, some of my writings. All I did Was take the particular thing, attached it to that form and it took me two minutes to type it, send it to Washington and I got back my copyright registration. I assume that is What you did. You took a cartridge, I assume from what Mr. Vittum tells me, you took a cartridge of the entire

Pac-Man game. I assume that. Or maybe I am assuming too much. MR. COHEN: Your Honor, what was done was the video tape was made of the attract mode and of the play of the Pac-Man game and the video tape which is a small thing, it was submitted to the Copyright Office as a deposit because the Copyright Office doesn't want anyone to wheel in a great big machine.

THE COURT: I understand that. My guess is that you are going to have trouble in the future even with the cartridges because there will be so many of them they are going to have to find a way to minimize that kind of storage problem.

I don't suppose it makes any difference for the purpose of this motion what you submitted to the Copyright Office. You have a copyright registration. You have a number. There is a presumption of validity and there is no issue raised about the validity of the copyright. MR. VITTUM: That's right.

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THE COURT: So it really doesn't make any difference.

MR. VITTUM: That's right. Thank you, your Honor. THE COURT: All right. Now I had said that I was going

to put this over until tomorrow morning at 9:00 o'clock and I will be very candid with you, I am having second thoughts about it. I would rather put it over until Wednesday morning at 9:00 o'clock because I have another trial going on and it's now nearly 6:00 o'clock and I don't know how much of this material you have been handing to me as fast as you can come back from your offices -- and this pile gets higher and higher and I have to read this material and go over my notes and be prepared to make the findings of fact and reach conclusions

I am going to put this over until Wednesday morning at 9:00 o'clock so it will give me just a few more hours to go over this material.

MR. VITTUM: Thank you, your Honor.

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THE COURT: Wednesday morning at 9:00 o'clock.

MR. ANDERSON: Thank you, Judge, and may I express our appreciation for your taking the time to hear us at great length.

THE COURT: All right. You are welcome.

MR. LAGOD: May I ask the indulgance of the Court -- may We leave these materials here until tomorrow morning when our staff will come over the first thing in the morning to Pick them up?

THE COURT: Yes, surely. MR. VITTUM: Would the Court like to have the materials

until Wednesday?

THE COURT: No, no. Thank you. (Thereupon an adjournment was taken to Wednesday, December 2, 1981 at the hour of 9:00 o'clock a.m.)